Supreme Court, U.S.
FILED

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IN THE SUPREME COURT OF THE UNITED STATES

October, 1995, Term

ALLEN A. IZADPANAH, et al
Petitioners

v.

EDWARD GROSS, et al,
Respondents

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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Earl M. Cunard, Janice M. Cunard
and Craft Industries, for the
benefit of Rudy Delsack

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QUESTIONS PRESENTED FOR REVIEW

(Presented in the order in which the questions are presented in the petition. As to considerations under Rule 10, please see Nos. 6, 7 and 10.)

1. Whether the courts below misconstrued the facts of the case.

2. Whether leave to amend the complaint should have been granted.

3. Whether the courts below erred in ruling that the district court did not have supplemental jurisdiction to determine whether, under Virginia law, the pertinent orders of the state court should be set aside on grounds of fraud.

4. Whether the courts below erred in ruling that the period of limitation for Plaintiff's alleged cause of action under Rule 10b-5 commenced prior to the transfer of the stock out of Plaintiff's ownership.

5. Whether the courts below erred in ruling that the period of limitation for the alleged cause of action under 42 U.S.C. Section 1983 commenced prior to the discovery of the fraud underlying such cause.

6. Whether the courts below erred in ruling that the causes of action under Rule 10b-5 and 42 U.S.C. Section 1983 are time-barred, in that they did not take into account that the periods of limitation for such causes of action were tolled by a Virginia statute during the pendency of an injunction against the filing of the instant action. That is, whether the court of appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court, i.e., notwithstanding the rule of Lampt, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350 (1991), that only equitable tolling shall no longer be applicable in Rule 10b-5 cases, the court of appeals refused to apply a statutory tolling in this case.

7. Whether the courts below erred in ruling that the forced seller doctrine does not apply to the alleged cause of action under Rule 10b-5, because no corporate merger was involved. That is, whether the court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, i.e., whether the forced seller doctrine is applicable to situations other than corporate mergers.

8. Whether the courts below erred in ruling that Petitioners have not pled a cause of action under 42 U.S.C. Section 1983.

9. Whether the courts below erred in ruling that Defendants' enforcement of an allegedly fraudlent Virginia state court judgment was not an abuse of process.

10. Whether the courts below erred in ruling that the principle of res judicata applies to the alleged causes of action, whereby Petitioners have not had an opportunity to be heard on the alleged fraud. That is, whether the court of appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court, i.e., notwithstanding the rule of Brown v. Felsen, 442 U.S. 127 (1979), that the principle of res judicata shall not be applied so as to deny due process, the court of appeals did so in this case.

11. Whether summary judgment should have been granted.

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PROCEEDINGS BELOW AND JURISDICTION

Summary judgment was granted against the petitioners, who were plaintiff and intervenors below, by the United States District Court for the Eastern District of Virginia. The district court had subject matter jurisdiction under 28 U.S.C. Sections 1331, 1332 and 1367. A written opinion was issued, but not published (App 6).

The grant of summary judgment by the district court was affirmed by the United States Court of Appeals for the Fourth Circuit, and a written opinion was issued, but not published (App 1). As to the issues presented herein, the opinion of the district was adopted by the court of appeals.

Judgment was entered by the court of appeals on January 30, 1996, and a petition for rehearing was denied by order of February 27, 1996 (App 15)

This Court has jurisdiction to review the judgment of the court of appeals under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

Petitioners were plaintiff (Allen A. Izadpanah), intervenors and appellants below. The court of appeals found that the interests of the petitioners coincided, and they are referred to collectively in its written opinion as "Izadpanah." Petitioners will do likewise in the instant petition. Respondents were defendants and appellees below and are referred to herein collectively as "Defendants."

Izadpanah claims that Defendants obtained his stock in a closely-held corporation by fraud, whereby he lost the value of such stock. Also, because of his loss of standing as a shareholder, he was prevented from prosecuting certain separate derivative actions in state court (the Boeing cases).

Defendants are alleged to have obtained Izadpanah's stock by having first obtained by

fraud a judgment against Izadpanah in a case which was unrelated to the Boeing cases (the Sirex case); and by wrongfully enforcing such judgment to attach Izadpanah's stock and cause its sale to one of the Defendants.

On the basis of the allegations in the complaint and the proposed amended complaint, which allegations are described in detail below, Izadpanah pled causes of action for securities fraud under Rule 10b-5 of the Securities and Exchange Commission and violation of civil rights under 42 U.S.C. Section 1983. Also, under Virginia law, Izadpanah pled conspiracy to injure him in his business, fraudulent inducement of the Sirex settlement agreement, actual and constructive common law fraud, and breach of fiduciary duty.

The following facts are alleged in the complaint and the proposed amended complaint:

> Izadpanah is a citizen of Maryland who was a majority shareholder, officer and director of Defendant Aidant, Inc. (Aidant). Defendant Edward Gross (Gross) is a Virginia lawyer and citizen who was the attorney for the other Defendants and for Sirex USA, Inc. (Sirex). Defendants Robert A. Hummel (Hummel) and Charles Crowe (Crowe) are citizens of Virginia who are shareholders and/or officers and directors of Aidant and/or Defendant Federal Computer Corporation (Federal). Aidant and Federal are Virginia corporations, each with its principal place of business in Fairfax County, Virginia.
>
> In 1989, pursuant to a contract among him, Aidant, Hummel and Crowe, Izadpanah took a leave of absence from Aidant, leaving the control of that corporation in the care of Crowe and Hummel.
>
> In Izadpanah's absence, Crowe and Hummel controlled Aidant through its board of directors. Thus, Crowe and Hummel each had a fiduciary duty to

protect Izadpanah's interests during his leave of absence. Also, as officers and/or directors of Aidant, Crowe and Hummel each had a fiduciary duty to Aidant to protect its interests, as well. Gross, in his role as the attorney for Crowe and Hummel, was also bound by the said fiduciary duties.

During his leave of absence, Izadpanah brought the Boeing cases against Hummel, Crowe, Federal and others, including an entity known as The Boeing Joint Venture, in the Circuit Court for Fairfax County, Virginia. In his capacity as a shareholder of Aidant, Izadpanah brought the Boeing cases as derivative actions, claiming mismanagement and misappropriation of corporate assets by Hummel and Crowe. Compensatory damages in excess of $3,750,000 were sought.

The principal Boeing case, Izadpanah V. The Boeing Joint Venture, 243 Va. 81 (1992), was dismissed at trial, appealed and remanded for a new trial.

While the latter appeal was pending, Defendants took the wrongful actions which resulted in Izadpanah's loss of his Aidant stock. Thus, upon remand of the said principal Boeing case to the Circuit Court for Fairfax County (the Virginia court), all of the Boeing cases were dismissed, because Izadpanah lacked standing as a shareholder to prosecute the derivative actions.

Defendants obtained Izadpanah's stock as follows. In 1989, Gross, who at that time did not represent any of the parties in the instant case, filed suit in the Virginia court on behalf of Sirex USA, Inc. (Sirex) against Aidant, Crowe and Izadpanah, to collect a debt of Aidant to Sirex (the Sirex case). Payment of such debt to Sirex had been guaranteed by Crowe and Izadpanah jointly, but not severally. In February,

1990, Gross obtained a default judgment against Aidant and Crowe on behalf of Sirex, but Izadpanah had answered and the Sirex case remained pending.

During the period from February 1, 1990, to December 31, 1990, the other Defendants conspired with Gross to arrange the payment in full of the debt of Aidant to Sirex, in consideration of an assignment of the claim of Sirex against Izadpanah as a guarantor of the said debt. Defendants caused such payment and assignment to occur in or about December, 1990, and this was intentionally not disclosed to Izadpanah or to the Virginia court at that time.

In April, 1991, Gross, acting now as the attorney for the other Defendants and in combination with them, negotiated a settlement agreement with Izadpanah to resolve the Sirex case (the Sirex settlement agreement). Gross did not disclose to Izadpanah or his counsel that, in dealing with Izadpanah at that time, Gross was representing the other Defendants, rather than Sirex.

Gross intentionally failed to disclose his true role, knowing that Izadpanah had set-offs against the other Defendants, as alleged in the Boeing cases, which were then on appeal; and knowing that, had Izadpanah and his counsel been aware of the payment and assignment, Izadpanah would not have entered into the Sirex settlement agreement.

As a part of his performance under the latter agreement, Izadpanah consented to the entry of a judgment against him in the Sirex case in May, 1991, in the amount of approximately $22,000 (the Sirex judgment). However, as was the case with the settlement agreement, had Izadpanah known of the payment and assignment, he would not have consented to such judgment.

Contemporaneously with the entry of the Sirex judgment against Izadpanah, Defendants, through Gross, caused the release of the said default judgment against Aidant and Crowe.

In or about July, 1991, Defendants, with the intent to continue and to obfuscate the fraud that was being perpetrated on Izadpanah, arranged for documentation of an alleged assignment to Federal of the Sirex judgment as of that time, without regard for the fact that the Sirex claim against Izadpanah had been assigned to Defendants in December, 1990, well before the entry of the Sirex judgment. The said documentation was not disclosed to Izadpanah or to the Virginia court until more than a year later, in the manner discussed below.

In August, 1991, Gross moved in the Sirex case, allegedly as counsel for Sirex, for the transfer of Izadpanah's stock to Gross for sale by him, with the proceeds to be applied in satisfaction of the Sirex judgment.

The latter motion and order were presented ex parte, without proper notice to Izadpanah or his counsel, and the order granting such motion (the stock turnover order) was entered on August 29, 1991. This order directed Izadpanah to turn over the stock to Gross for sale and directed Aidant to replace Izadpanah's stock with newly issued stock and to turn over the same to Gross for sale. This action was taken by the Virginia court notwithstanding that it did not have jurisdiction over the res to be attached by such order, i.e., Izadpanah's stock, which was located in Maryland.

Izadpanah did not turn over his stock to Gross, but Aidant, through Crowe and/or Hummel, nonetheless canceled the stock and issued new shares to replace the same, which new shares were turned over to Gross for sale.

Gross then sold the stock to Federal for $500, but failed to comply with the stock turnover order, in that he gave inadequate notice of the sale, sold the stock in violation of the terms stated in the announcement, and sold the stock for an inadequate and nominal sum.

In November, 1991, Izadpanah moved the Virginia court to vacate the stock turnover order and to set aside the sale of the stock. In denying the latter motion, the Virginia court was unaware (as was Izadpanah) of the true circumstances surrounding the entry of the Sirex judgment and thus did not rule on the fraud described above.

The principal Boeing case was remanded for a new trial in January, 1992, and the defendants therein moved for dismissal of all of the Boeing derivative actions on grounds that Izadpanah was no longer an Aidant shareholder. Such motion was granted by the Virginia court.

Application of the $500 received from Federal for the stock had not satisfied the Sirex judgment, and Gross continued his enforcement of such judgment through collection activity against Izadpanah. In the course of such activity, Izadpanah caused inquiry to be made of Sirex as to the balance due on the debt. This inquiry was made of Sirex, because there had been no disclosure that the Sirex claim or the Sirex judgment had been assigned. Upon such inquiry, Izadpanah's counsel was advised by Sirex in September, 1992, that it had been paid in full for the debt in December, 1990.

Upon the discovery of this evidence that the real parties in interest at the time of the negotiation of the Sirex settlement agreement, and at the time of Izadpanah's consent to the Sirex judgment, appeared to be the Defendants

other than Gross, and that Gross had failed to disclose the true situation, Izadpanah's counsel in the Sirex case sought the issuance of subpoenas duces tecum to obtain evidence of the fraud.

Defendants had such subpoenas quashed and obtained sanctions by the Virginia court against Izadpanah's said counsel for the issuance of the same, based on the manner in which the subpoenas had been obtained. In the course of the latter proceedings, the Virginia court did not rule on the alleged fraud resulting in Izadpanah's loss of his stock, announcing that it was ruling only on the issue pending before it, i.e., whether the subpoenas had been properly obtained.

Nonetheless, during the latter proceedings, Gross disclosed to the Virginia court and to Izadpanah, for the first time, that the Sirex judgment had been assigned. However, Gross represented that the assignment had taken place in or about July, 1991, rather than before the entry of the Sirex judgment against Izadpanah, as alleged by Izadpanah.

As alleged above, it was during September, 1992, that Izadpanah learned of the fraud which had resulted in the stock turnover order of August 29, 1991, and the subsequent sale of his stock. However, at the time of this discovery, the commencement of any action based thereon had been stayed by an injunction of the Virginia court entered in June, 1992, in the principal Boeing case (App. 18). Such injunction continued until June, 1994, and the instant case was filed on August 29, 1994.

Defendants filed a motion for dismissal and for summary judgment, which motion was granted via the district court's said opinion. While the latter motion was pending, the intervenors entered the case and Izadpanah moved for leave to amend the complaint.

However, when the district issued its said opinion, the motion to amend was not decided and the proposed amended complaint was not considered.

After the dismissal, Izadpanah moved to have the judgment amended and altered so as to include, inter alia, a ruling on the motion to amend. This motion was denied by the district court by its order of December 2, 1994 (App xx).

Izadpanah appealed, raising the same issues as are raised herein, inter alia, and the court of appeals affirmed the grant of summary judgment of dismissal.

In doing so, the court of appeals misconstrued Izadpanah's withdrawal of an issue in the course of the appeal as a concession that the district court lacked jurisdiction to consider any of his fraud claims. (This withdrawal is described below.) Thus, the dismissal of the fraud claims was affirmed on the basis of such misconstruction, whereas the district court had held the fraud claims to be barred by res judicata. However, as to the other issues relating to the dismissal, the court of appeals, in its initial opinion, adopted the district court's opinion.

Izadpanah then petitioned for a rehearing, on grounds of the said misconstruction and that reliance on the same had led the court of appeals to fail to consider the district court's ruling that the fraud claims were barred because of res judicata, rather than because of a lack of jurisdiction.

Such a rehearing was denied without comment, the court of appeals apparently adopting the opinion of the district court as to res judicata, in addition to its other rulings with respect to the grant of summary judgment. Thereafter, this petition ensued.

The court of appeals also ruled on other issues not pertinent to the instant petition.

ARGUMENT

I. Introduction

In presenting argument, Izadpanah refers herein to the opinion of the district court, inasmuch as the court of appeals adopted the same with respect to the grant of summary judgment. However, on the one point relevant to this petition, with respect to which the court of appeals initially made a separate ruling, its opinion is addressed.

The latter point is the said misconstruction by the court of appeals of Izadpanah's withdrawal on appeal of the issue of whether the district court had jurisdiction to review the constitutionality of the stock takeover order entered by the Virginia court.

II. Misconstruction of the Facts

A. The crux of Izadpanah's allegation of fraud is that the undisclosed payment to Sirex and assignment of the debt to Defendants occurred in December, 1990, well before Izadpanah's consent to the Sirex judgment; and that such payment and assignment were not disclosed until September, 1992.

The said discovery of the alleged fraud resulted from Izadpanah's receipt of a summary of Sirex accounts receivable, wherein it is noted that payment in full of the Aidant debt was received by Sirex in December, 1990. Also, Izadpanah obtained an affidavit in corroboration of such payment.

Izadpanah caused inquiry to be made of Sirex in September, 1992, as to the balance due on the Sirex judgment against him, inasmuch as collection activity against him had continued into 1992, the 1991 sale of stock not having satisfied the judgment. The inquiry was directed to Sirex because, as far as Izadpanah knew, the judgment was payable to Sirex. (The Court will recall that the July, 1991, paperwork concerning the assignment was not disclosed until November, 1992, after

Izadpanah's receipt of the document from Sirex.) It was this September, 1992, inquiry that produced the said Sirex document.

On the other hand, Defendants allege that the payment and assignment took place in July, 1991, after Izadpanah's said consent.

Notwithstanding that the said allegations concerning the timing of the assignment presented a genuine issue of material fact, and notwithstanding that no evidentiary hearing had been held, the district court's opinion recites that the assignment took place in July, 1991, without regard to Izadpanah's allegation and evidence that it was the nondisclosure of the alleged December, 1990, payment and assignment that rendered fraudulent the inducement of his entry into the Sirex settlement agreement in April, 1991.

B. It is uncontested that the motion to vacate the stock turnover order was heard in 1991, well before the discovery in 1992 of the alleged fraud.

In November, 1991, Izadpanah moved to vacate the stock turnover order, but not on the grounds of the said fraudulent inducement. Rather, the grounds were that the Virginia state court did not have jurisdiction over the stock, which was located in Maryland. The Court will please note that the alleged fraud could not have been at issue at the 1991 hearing, because it was not until September, 1992, that Izadpanah discovered such fraud, as described above. Notwithstanding, the trial court misconstrued these facts and found that the state court considered the fraud in the course of the 1991 motion.

With respect to the district court's finding that it was not fraudulent for Defendants not to disclose the July, 1991, transaction at the time of the Sirex settlement agreement and consent judgment in April and May, 1991, this Court will note that such finding is based on a misunderstanding of the two conflicting versions of the timing of the assignment. It is obvious that a July

transaction could not be disclosed in May of the same year.

This confusion arises from the district court's failure to recognize that Izadpanah is complaining about the nondisclosure of the December, 1990, transaction in the course of the negotiations in April and May, 1991, not any failure to disclose the July, 1991, paperwork. Izadpanah contends that the July, 1991, paperwork merely "covered" the payment and assignment in December, 1990.

It is the failure to disclose the December, 1990, transaction, and that Izadpanah was being asked to settle with, and to give a consent judgment to, the Defendants, rather than to Sirex, that is at the heart of this case. This is because Izadpanah had set-offs against Defendants, via the Boeing litigation, and he would not have consented to the Sirex judgment against him, had he known the true facts.

C. Although the state court found in 1991 that the Sirex debt had not been paid by Izadpanah, as recited in the district court's opinion, such determination was made in connection with Izadpanah's effort to have the stock turnover order vacated, not in connection with the alleged fraud. The latter finding took place well before the 1992 discovery of the alleged fraud. Subsequent findings that Izadpanah had not paid the Sirex debt did not refer to the alleged fact that Sirex had been paid secretly by Defendants.

Thus, there has never been a finding by the state court as to whether Sirex has been paid, as opposed to whether Izadpanah has paid the debt in question.

The district court misconstrued these circumstances in giving relevance to Izadpanah's failure to pay Sirex. It is the secret payment to Sirex by one or more of the Defendants that is relevant, not Izadpanah's failure to pay Sirex.

D. Notwithstanding any of the pleadings and arguments in the state court at the various hearings, each of the two state court judges who held hearings after the discovery of the fraud expressly stated on the respective records that he was not deciding whether the fraud had occurred.

The first such proceeding commenced in the Sirex case in November, 1992, and continued from time to time until March, 1993, before the Honorable Bruce Bach of the Virginia state court. There were two motions under consideration, the first to quash subpoenas and the second to sanction Izadpanah's then counsel for having obtained and utilized such subpoenas. As the pertinent transcripts show, in his consideration of these motions Judge Bach said he was not ruling on the allegations of fraud in the inducement of the Sirex agreement and judgment (App 19).

Indeed, Judge Bach ruled that whether the fraud had actually occurred was irrelevant to the motions before him, in that he rejected Izadpanah's evidence of such fraud, i.e., the document received by Izadpanah from Sirex which indicated that Sirex had been paid before the entry of the Sirex judgment, and the testimony in corroboration thereof. Judge Bach ruled on the conduct of Izadpanah's counsel, not on the conduct of Defendants, and the subpoenas in question were quashed and a sanction was imposed.

The second proceeding at which the fraudulent inducement could have been ruled upon was before the Honorable Thomas Fortkort of the Virginia state court in March, 1993. Judge Fortkort was considering Defendants' motion in the Boeing cases for dismissal of those derivative actions, on grounds that Izadpanah had lost his standing to prosecute such actions when he lost his stock. As the transcripts show, in the course of dismissing the Boeing cases Judge Fortkort stated that he was not ruling on the alleged fraud (App 21).

Further, as shown by the latter transcripts, Judge Fortkort specifically noted that, if such a fraud had occurred, a separate action could be brought by Izadpanah based thereupon. Indeed, the instant federal action was discussed between Judge Fortkort and Izadpanah's counsel in open court (App 23).

Defendants take the opposite position, i.e., that the state court decided the fraud issue. Thus, there was a material issue of fact in the instant case, and in deciding such issue on the state court record, the district court misconstrued the transcripts of the state court proceedings and found that the said state court judges did, in fact, rule on the alleged fraud.

E. Izadpanah has alleged that an injunction against the filing of the instant case was in effect during the periods of limitation applicable to his causes of action under Rule 10b-5 and 42 U.S.C. Section 1983, i.e., during the first two years following the discovery of the fraud. Defendants have contested the existence of such injunction.

In deciding this material issue of fact on the state court record, the district court misconstrued the injunction order of the state court (App 18), in finding that the filing of the instant case was not enjoined. (The latter finding must be implied, there being no mention of the injunction in the district court's opinion.)

Izadpanah has alleged that this injunction was entered by the state court in June, 1992, in the Boeing cases; and that such injunction continued until June, 1994, at which time the lifting thereof became final as the result of the completion of the appeals in the Boeing cases.

The effect of the said injunction on the district court's rulings as to the expiration of the periods of limitation for Izadpanah's alleged causes of action under Rule 10b-5 and Section 1983 is discussed below.

F. The foregoing misconstructions of fact led to reversible error, in that (a) summary judgment should not have been granted in the presence of material issues of fact, and (b) the said misconstructions not involving material issues of fact led to other errors of law, as described below.

III. Omission of Ruling on Motion to Amend Complaint

A. The pending motion for leave to amend the complaint had been filed well before the time of the entry of the district court's opinion and order of dismissal, but the hearing on such motions had not been held. Thus, in its order denying Izadpanah's post-dismissal motion to alter and amend, the district held that the motion to amend was not before it (App 14).

However, the hearing had been delayed pending the decision on Defendants' motion for summary judgment of dismissal, at the district court's suggestion. The said suggestion is set forth on Page 22 of the transcript of the proceedings in the district court of October 21, 1995:

> THE COURT: I haven't ruled yet. You will get an order from me.
>
> * * *
>
> MR. BURROUGHS: Your Honor please, what do you want to do about the motion for leave to amend the complaint and a motion to intervene?
>
> THE COURT: You all will have to notice them. Depending on what my ruling is, you may or may not want to notice them, I don't know.

This point was later confirmed with the district court's law clerk, who stated that she also understood that the said two motions were to be noticed and heard after the ruling on Defendants' motion for dismissal and summary judgment. Further, this confirmation

was brought to the attention of the district court in a subsequent filing.

In failing to decide the pending motion for leave to amend the complaint, the district court did not address the following four issues raised thereby which were not raised by the initial complaint:

> (i) Izadpanah has alleged a conspiracy to injure him in his trade, business or profession, which is prohibited by Code of Virginia, Sections 18.2-499, 500 (App 17).
>
> (ii) Izadpanah has alleged a cause of action for recision of the Sirex settlement agreement as the result of the fraudulent inducement of such agreement.
>
> (iii) Izadpanah has alleged that the Sirex debt was extinguished by the payment thereof in December, 1990. Such payment is alleged to have been made on behalf of either the principal debtor, Aidant, or on behalf of Crowe, who was Izadpanah's joint (but not several) guarantor of the debt owed by Aidant to Sirex. Thus, Izadpanah contends that such payment extinguished the debt and that he has no liability for its further payment.
>
> (iv) Izadpanah contends that the consent judgment against him in the Sirex case merged with the judgment against Aidant and Crowe which had been obtained previously in that case, in that he was not severally liable as a guarantor. Thus, Izadpanah contends that he was released when the said prior judgment was released immediately after the consent judgment was entered against him.

None of these four issues was addressed by the district court in its said opinion and order, and Izadpanah contends that this case should not have been dismissed without rulings on the motion for leave to amend the complaint and on the said four issues, especially where the delay which led to the amended complaint

not having been argued before the district court was the result of that court's own suggestion.

IV. Jurisdiction of District Court

A. The district court erred in ruling that it had been asked to review, as a federal court, the factual findings and rulings of the state court. However, there was one exception to the foregoing, but it is no longer relevant, having been excluded from the scope of this petition.

Notwithstanding that it is no longer relevant, the latter exception must be explained, inasmuch as it is involved in the misconstruction by the court of appeals mentioned above. Although the district court had not been asked to review, as a federal court, the findings and rulings of the state court, Izadpanah had asked for a federal review of the constitutionality of the stock turnover order, i.e., whether the Virginia court had jurisdiction over the stock located in Maryland. Izadpanah contended that he had been denied due process by the action of the Virginia court, because it had acted without jurisdiction over the stock.

The latter request should not have been made by Izadpanah, because the district court lacked jurisdiction to review the constitutionality of the state court's action, pursuant to District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1993). The latter case holds that such a federal review may be held only by this Court, after state court appeals to the state court of last resort. Accordingly, when Izadpanah's counsel realized the mistake in the course of the appeal below, such mistake was admitted and the relevant issue was withdrawn.

B. However, such concession did not affect Izadpanah's position that, as to the other issues in the case, the district court had not been asked to review, as a federal

court, factual findings and rulings of the state court. Rather, it remained Izadpanah's position that the district court had supplemental jurisdiction and jurisdiction based on diversity of citizenship to sit as a state court and set aside the Sirex judgment pursuant to the common law and Code of Virginia, Section 8.01-428(D), on grounds of fraud on the court. The latter statute states:

> **D. Other judgments or proceedings.** - This section does not limit the power of the court to entertain at any time an independent action to ... to set aside a judgment or decree for fraud upon the court.

Notwithstanding Izadpanah's said position, his withdrawal of the said issue on appeal was misconstrued by the court of appeals to be a concession that the district court lacked jurisdiction over Izadpanah's fraud claims.

However, the actual concession was limited to the single issue described above. Izadpanah's reply brief in the appeal below stated as follows:

> In their opening brief, Appellants, Plaintiff and Interveners below, ... presented the following issue:
>
> > 3. Whether the trial court erred in holding that it did not have original jurisdiction to determine whether Plaintiff's federal right to due process was violated by an order of the Virginia state court.
>
> Upon consideration of the authorities presented in the answering brief of Appellees ..., Plaintiff withdraws the latter issue from this appeal ....

The district court had ruled that the fraud claims were barred by res judicata.

However, in affirming the district court's grant of summary judgment as to the fraud claims, the court of appeals initially relied on the misconstrued concession, rather than res judicata. However, when the misconstruction was explained in Izadpanah's petition for rehearing, the court of appeals, in denying the said petition without comment, apparently adopted the position of the district court as to the applicability of res judicata as to the fraud claims, having previously adopted its other rulings as to Izadpanah's other claims.

V. Periods of Limitation

A. The district court erred in ruling that the three-year portion of the combination of one-year and three-year periods of limitation, applicable to Izadpanah's alleged cause of action under Rule 10b-5, commenced prior to the transfer of the stock out of Izadpanah's ownership.

The measuring point for the commencement of the said three-year period of limitation imposed on Rule 10b-5 cases by Lampt, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 111 S.Ct. 2773 (1991), and Howard v. Haddad, 962 F.2d 328, 330 (4th Cir. 1992), is the time of the "violation." A violation of Rule 10b-5 (App 16) does not occur until, as stated in the latter rule, fraud "in connection with the purchase or sale of any security" takes place.

Obviously, the purchase or sale must itself occur in order for the required connection to exist. Prior to the purchase or sale, or in the instant case, prior to Izadpanah's loss of his stock via the turnover order of August 29, 1991, no securities law violation had occurred. Thus, Izadpanah's cause of action under Rule 10b-5 did not accrue until the latter date, i.e., not until the occurrence of the "last event underlying

the claim." Walck v. American Stock Exchange, 687 F.2d 778, 791 (3rd Cir. 1982), cert. denied, 461 U.S. 942 (1983).

This action was filed on August 29, 1994. Therefore, it is not time-barred as to the said three-year period of limitation.

As to the one-year portion of the said combination of periods of limitation under Rule 10b-5, measured from the time of the discovery of the violation, please refer to the discussion below having to do with the said injunction issued by the Virginia state court. Izadpanah contends that such injunction tolled the applicable period of limitation, pursuant to a Virginia statute, such that the one-year limitation was met.

B. The district court erred in ruling that the period of limitation for Izadpanah's cause of action under 42 U.S.C. Section 1983 commenced prior to Izadpanah's discovery of the fraud underlying such cause. There is clear precedent in the Fourth Circuit that it is the discovery of the fraud which causes the period of limitation to commence.

The period of limitation applicable to civil rights actions under Section 1983 does not commence until the wrong is discovered, which in this case occurred in September, 1992, at the time of the discovery of the alleged fraud. Cox v. Stanton, 529 F.2d 47 (4th Cir. 1975). As noted in the district court's opinion, the applicable period in Virginia is two years, and this case was filed in August, 1994, within the required two-year period.

C. The district court erred in ruling that Izadpanah's alleged causes of action under Rule 10b-5 and Section 1983 are time-barred, in that the district court failed to take into account that the periods of limitation for such causes of action were tolled by Code of Virginia Section 8.01-229(C) during the pendency of an injunction against

the filing of the instant action, as contended by Izadpanah. The latter statute states:

> **C. Suspension during injunctions.** - When the commencement of any action is stayed by injunction, the time of the continuance of the injunction shall not be computed as any part of the period within which the action must be brought.

As explained above, there was a state court injunction in effect as of September, 1992, the time of the discovery of the alleged fraud underlying Izadpanah's claims under Rule 10b-5 and Section 1983, which injunction continued from June, 1992, until June, 1994.

This action having been filed in August, 1994, only a few months after the end of the injunction, the filing was within the untolled period of one year from Izadpanah's discovery of the violation, as required by the Lampt decision, supra.

With respect to the holding of Lampt that equitable tolling shall no longer apply in federal securities cases, this Court will please note that the injunction in question resulted in a statutory tolling, rather than an equitable tolling. Thus, the latter provision of Lampt is not applicable in the instant case.

A final aspect of the effect of the said injunction and statutory tolling is that, as to the said three-year portion of the combination period of limitation applicable to Rule 10b-5 actions, as well as the said two-year period applicable to Section 1983 actions, elimination of the period of approximately two years that the said injunction was in effect means that the latter two deadlines had been met, even if this Court does not accept Izadpanah's positions as to the times at which the respective periods of limitation commenced.

VI. Forced Seller Doctrine

A. The district court erred in ruling that the forced seller doctrine does not apply to Izadpanah's cause under Rule 10b-5. Izadpanah contends that the complaint and/or the first amended complaint alleges a valid cause of action for securities fraud. That the stock was sold because of the entry of the stock turnover order does not preclude Izadpanah's being protected by Rule 10b-5.

Izadpanah alleges that he lost his stock in a forced sale, i.e., Defendants' wrongful actions were designed to, and did, cause Izadpanah to be forced into transferring ownership of his stock back to Aidant, which in turn transferred the stock to Federal at the sale held by Gross pursuant to the stock takeover order.

Izadpanah need not even have relied on Defendants' deception as to the fraud which led to the sale of the stock. The fact that Defendants intended to create a forced sale (as Izadpanah has alleged) is sufficient for the sale to be deemed a forced sale. Further, a delay between the fraud and the sale does not matter. Travis v. Anthes Imperial, Ltd., 473 F.2d 515 (8th Cir. 1973).

A forced sale is deemed to result where the circumstances have the practical effect of a sale and render the sale itself a formality. Arnesen v. Shawmut County Bank, 504 F.Supp 1077 (D. Mass. 1980) The forced sale doctrine is an exception to the rule of Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 95 S.Ct. 1917 (1975), that only an actual purchaser or seller of a security is entitled to the protection of the securities laws. Under such doctrine, the plaintiff is said to be a "constructive seller." Umstead v. Durham Hosiery Mills, Inc., 578 F.Supp. 342, 346 (M.D.N.C. 1984). The doctrine has been recognized in the district in which the district court was sitting. Arnold v. Moran, 687 F.Supp 232 (E.D. Va. 1988).

The forced sale doctrine has been construed such that, where "there is a complex mixed question of law and fact presented, upon which reasonable persons could differ (as to whether the doctrine is applicable), ...(it is) not amenable to disposition by summary judgment." Union Carbide Corp. Cons. Prod. Bus. Sec. Litigation, 676 F.Supp. 458, 477 (S.D.N.Y. 1987). Izadpanah contends that there is a complex mixed question of law and fact presented herein, and that, therefore, the summary judgment granted by the district court will not lie.

In its opinion, the district court noted that the forced sale doctrine is generally applied to claims resulting from corporate mergers, in the course of which shareholders are forced to sell their stock as the result of securities fraud. Izadpanah contends that, such application in other cases notwithstanding, the forced sale doctrine is applicable where, as the result of fraud, a shareholder is forced to sell his stock other than in a merger situation. The objective of the doctrine is to protect the shareholder who has been defrauded into a loss of the ownership of his stock, and application of the doctrine is not limited to corporate merger situations. Arnold, supra, 687 F.Supp, at 235; Union Carbide, supra, 676 F.Supp, at 476.

That the context in the instant case is not a corporate merger does not lessen the need for the protection of the anti-fraud provisions of the securities laws. It is the substance of the doctrine, that a loss of ownership through a sale caused by a wrongful act or omission shall be treated as a forced sale, that is pertinent to this Court's consideration of the issue.

VII. 42 U.S.C. Section 1983

A. The district court erred in ruling that Izadpanah has not pled a cause of action under Section 1983, in that the Sirex judgment was construed to be valid, rather than to have

been obtained by fraud, as alleged by Izadpanah. The district court ruled that the enforcement of a valid judgment cannot be the basis for a civil rights claim.

However, in light of the district court's misconstruction of the facts surrounding the allegedly fraudulent inducement of Izadpanah's consent to the Sirex judgment, Izadpanah contends that, under Izadpanah's version of the contested facts, the Sirex judgment was not a valid judgment. Thus, Defendants' enforcement of the same under color of state law, via the stock takeover order and sale, whereby Izadpanah lost ownership of his stock, will be deemed a violation of Section 1983, assuming Izadpanah wins the factual contest over whether the Sirex judgment was obtained by fraud.

Such finding of validity was made without there having been a trial of the alleged fraud. Thus, once again, the district court granted summary judgment notwithstanding a contested material fact.

VIII. Abuse of Process

A. The district court erred in ruling that Defendants' enforcement of the Sirex judgment was not an abuse of process, in that the district court construed such judgment to be valid, rather than to have been obtained by fraud. It was held that the enforcement of a valid judgment cannot constitute abuse of process.

The finding of validity was made without there having been a trial of the alleged fraud. Again, summary judgment was granted in the presence of a contested issue of material fact.

IX. Res Judicata

A. The district court erred in ruling that the principle of res judicata applies to Izadpanah's alleged causes of action, in that the district court misconstrued the rulings

and factual findings of the state court to have included consideration of the alleged fraud. As described above, Izadpanah contends that the said issues were not considered by the state court.

The applicable transcripts make it clear that the issue of fraud was not considered, even to the point of one of the state judges suggesting that, while he did not view the alleged fraud as relevant to the matter before him, Izadpanah's allegations of fraud may be the basis for a separate action. Izadpanah's response to such suggestion and other factors was the filing of the instant case.

Also, the district court ruled that the question of whether a violation of Rule 10b-5 occurred had already been decided by the state court. However, such ruling overlooks the point of law that jurisdiction to decide such question is exclusively lodged in the federal courts, pursuant to 15 U.S.C. Section 78aa. Thus, as a matter of law, the Rule 10b-5 question could not be decided by the state court, notwithstanding that such court could consider various facts that would bear on the issue.

There is another determinative aspect of Defendants' attempt to use res judicata to preclude the district court's consideration of the alleged fraud. Such aspect is that application of the latter principle should not result in the protection of persons who have committed fraud in the course of obtaining the prior rulings on which the plea of res judicata is based.

The opinion in Powell v.American Bank & Trust Co., 640 F.Supp. 1568 (N.D. Ind. 1986), is particularly helpful with respect to this point, because of the similarity of that case to the instant case, and the Powell court's analysis of the role of res judicata. A state probate court had approved an agreed sale of stock. Subsequently, the sale was attacked in federal court on grounds of a fraudulent nondisclosure prior to the plaintiff's agreement to the sale, such agreement having

led to the probate court's approval of the sale. The said fraud was not discovered until after the sale had been approved. The defendant in Powell construed the federal suit in that case as a collateral attack on the state court's approval of the sale and also pled res judicata.

The Powell court held that the federal suit did not constitute an impermissible attack on the probate ruling and that res judicata was not applicable. After ruling that the complaint alleged a fraud on the plaintiff as well as upon the court, the Powell court stated:

> Having defrauded the plaintiffs, the defendants now want to use the court order obtained by that fraud as a bar to the plaintiffs litigating the issues which the fraud effectively prevented any litigation about. To sanction the preclusion of the plaintiffs' claim via res judicata under facts such as these would be to sanction the defrauding of any litigant by an opponent fast enough and shifty enough to get a state court order pertaining to the issues which the innocent litigant seeks to argue before a court. Surely res judicata was not created to protect such fraud upon the courts. 640 F.Supp, at 1574.

Further, a federal court may act on the same controversy under its original or supplemental jurisdiction, even if the parties and/or the factual issues are identical, i.e., even if the principles of res judicata or collateral estoppel are applicable. This is because a federal court is required to protect a plaintiff against any denial of due process that may result from the application of such principles. The need for protection of the constitutional right outweighs the benefit of the use of the said principles. Brown v. Felsen, 442 U.S. 127, 99 S.Ct. 2205 (1979);

Powell, supra. The Powell court, on the very analogous facts described above, said:

> ...(T)he plaintiffs never had an opportunity to be heard (on the fraud) by the (state court) because of the fraud worked on them by the defendants. The petition seeking the court's approval of the sale was premised on the alleged fraud of the stock sale itself.... To use such an order to preclude this litigation would be to deprive the plaintiffs of an opportunity to be heard. Such use of res judicata would violate due process. 640 F.Supp., at 1574.

Yet another aspect of the use of res judicata in this case is that there are only four proceedings of the state court which conceivably could be vehicles for the prior rulings which are necessary to the use of the latter principle. Two of these are discussed above, i.e., the two proceedings occurring after the discovery of the fraud, in each of which the state court judge declared on the record that he was not deciding the fraud issue. The other two are those resulting in the entry of the Sirex judgment and the issuance of the stock takeover order.

As to both the Sirex judgment and the stock takeover order, the issues, as well as the parties (insofar as they were known to Izadpanah and the state court) were different than those involved in the instant case. With respect to the Sirex judgment, Sirex and Izadpanah were the parties to a collection case, in the course of which the undiscovered fraud was not considered. With respect to the stock turnover order, Sirex and Izadpanah were the parties to an attachment, during the course of which the undiscovered fraud was not considered.

However, even if the criteria for the use of res judicata could be said to have been met herein, where a plaintiff is unaware of his cause of action, and thus unaware that it may

be adjudicated in the earlier proceeding, res judicata and collateral estoppel will not be applied, provided that the lack of awareness is the result of intentional concealment by the defendant. Hartnett v. Billman, 800 F.2d 1308 (4th Cir. 1986).

Herein, Izadpanah has alleged that such intentional concealment led to his lack of awareness of his causes of action based on the fraud, as to the two proceedings which occurred prior to his discovery of the fraud. Thus, all four of the proceedings at which the fraud could conceivably been considered have been accounted for, and Izadpanah contends that the issue was simply never decided by the state court, whereby res judicata is not applicable.

(Even the July, 1991, paperwork for the assignment of the Sirex claim to Defendants was not disclosed until after the September, 1992, discovery of the fraud. Such disclosure occurred at the hearing in November, 1992, on Defendants' motion to quash the subpoenas Izadpanah's then counsel had requested upon their discovery of the fraud.)

The reliance of the district court in its said opinion on the rule of Keith v. Aldridge, 900 F.2d 736, 740 (4th Cir. 1990) (A-253), that Izadpanah's awareness of the fraud does not control, is misplaced, due to the district court's said misconstruction of the facts surrounding the alleged fraud. It is the intentional concealment of the fraud by Defendants which makes applicable the rule of Hartnett, supra. It is only in the absence of such concealment that the rule of Keith would apply.

Finally, the ultimate question is whether it would be unfair to preclude consideration of the fraud issue, in that, because of the state court's declining to hear the issue, Izadpanah has yet to be heard on the issue, despite his having attempted to raise such issue in the state court. If to preclude consideration of the issue would be unfair under the circumstances of this case, the

doctrine of res judicata is not to be applied. Sandberg v. Virginia Bankshares, Inc., 979 F.2d 332 (4th Cir. 1992).

Therefore, Izadpanah contends that the principles of res judicata and collateral estoppel are not applicable in this case.

X. Summary Judgment

A. It is apparent from the discussion above that summary judgment was granted in this case in the presence of contested issues of material fact.

Therefore, it is Izadpanah's position that, genuine issues of material fact having been presented herein, summary judgment will not lie; and that Defendants are not entitled to judgment on the uncontested facts, such that, likewise, summary judgment will not lie.

XI. Considerations Under Rule 10

A. The court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, i.e., whether the forced seller doctrine is applicable to situations other than corporate mergers.

B. The court of appeals has decided important federal questions in ways that conflict with relevant decisions of this Court: (1) Notwithstanding the rule of Lampt, supra, that only equitable tolling shall no longer be applicable in Rule 10b-5 cases, the court of appeals refused to apply a statutory tolling in this case; and (2) notwithstanding the rule of Brown, supra, that the principles of res judicata shall not be applied so as to deny due process, the court of appeals did so in this case.

RELIEF SOUGHT

I. Izadpanah seeks to have the grant of summary judgment of dismissal reversed and the case remanded for trial.

II. In the alternative, if this Court affirms the dismissal of the federal causes, Izadpanah seeks to have the state causes of action remanded for consideration by the district court of whether supplemental jurisdiction should be exercised, with instruction that, if such supplemental jurisdiction is not to be exercised, the state causes of action should be dismissed without prejudice to their being refiled in the appropriate state court.

Respectfully submitted,

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APPENDIX TO THE
PETITION FOR WRIT OF CERTIORARI

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UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

ALLEN A. IZADPANAH,
Plaintiff-Appellant,

87 AIDANT LIMITED PARTNERSHIP; FRED A. PAGE; TERRY PAGE; DOUGLAS STUP; EARL M. CUNARD; JANICE A. CUNARD; CRAFT INDUSTRIES, for the Benefit of Rudy Delsack,
Appellants,

v.

EDWARD GROSS; ROBERT A. HUMMEL; FEDERAL COMPUTER CORPORATION; CHARLES CROWE; AIDANT, INCORPORATED,
Defendants-Appellees.

No. 95-1163

ALLEN A. IZADPANAH,
Plaintiff-Appellee,

v.

EDWARD GROSS; ROBERT A. HUMMEL; CHARLES CROWE; AIDANT, INCORPORATED,
Defendants-Appellants,

and

FEDERAL COMPUTER CORPORATION,
Defendant.

No. 95-1246

Appeals from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Claude M. Hilton, District Judge.
(CA-94-1150-A)

Argued: December 4, 1995

Decided: January 30, 1996

Before ERVIN, Chief Judge, and WIDENER
and WILKINS, Circuit Judges.

Affirmed in part and remanded in part by unpublished per curiam opinion.

COUNSEL

ARGUED: William S. Burroughs, Jr., Alexandria, Virginia; Walter Theodore Charlton, Arlington, Virginia, for Appellants. Edward Gross, GROSS & ASSOCIATES, Fairfax, Virginia, for Appellees. **ON BRIEF:** Joel A. DeBoe, Arlington, Virginia, for Appellants.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Allen A. Izadpanah brought suit against Edward Gross, Robert A. Hummel, Aidant, Incorporated (Aidant), Federal Computer Corporation (FCC), and Charles Crowe (collectively, "Defendants"), seeking

to overturn a court-ordered sale of his stock in Aidant and to recover damages for an alleged fraud on a state court, violations of civil rights under 42 U.S.C.A. §§ 1983, 1985 (West 1994), violations of § 10 of the Securities Exchange Act of 1934, 15 U.S.C.A. § 78j(b) (West 1981), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5 (1995), and violations of Virginia securities laws. The district court granted summary judgment against Izadpanah on all claims, but it denied a motion by Defendants for sanctions. We affirm the grant of summary judgment against Izadpanah, but remand for reconsideration of sanctions.

I.

In May 1991, as a result of negotiations to settle an outstanding judgment against him as a guarantor of a debt owed by Aidant,[1] Izadpanah entered into a consent judgment in favor of Sirex USA, Incorporated (Sirex). After several unsuccessful collection attempts, Sirex executed documents transferring its rights in the judgment to FCC in July 1991. FCC filed a Motion to Turnover Property with the Fairfax County Circuit Court in August 1991, and the court ordered the sale of Izadpanah's stock in Aidant with the proceeds to be applied to the consent judgment. Izadpanah subsequently filed a motion to vacate the sale, arguing that the state court did not have jurisdiction over the stock. The state court rejected Izadpanah's argument, and the Supreme Court of Virginia affirmed.

Izadpanah then filed this action in the district court, asserting a conspiracy between Crowe, Hummel, and Gross, acting both individually and through Aidant and FCC, to deprive him of his stock in Aidant and to gain complete control of that company. He alleged that, as a part of this conspiracy, Defendants committed a fraud on the state court by inducing him to enter into the consent judgment without disclosing that FCC had actually purchased the rights to the judgment from Sirex prior to May 1991. He also argued that Defendants conspired to deprive him of his stock without due process of law and that

[1]Crowe and Hummel were shareholders in Aidant and apparently controlled its board of directors. FCC—controlled by Hummel—was also a shareholder in Aidant. When the guaranty agreement was signed in 1988, Izadpanah was an officer and director of Aidant.

the court-ordered sale of his stock in Aidant violated federal and state securities laws. The district court granted summary judgment against Izadpanah on the grounds that it did not have jurisdiction to review decisions by state courts; that Izadpanah's civil rights and securities claims were barred by the applicable statutes of limitation; and, further, that all of the claims were precluded by Virginia principles of res judicata and collateral estoppel applied under the full faith and credit statute, 28 U.S.C.A. § 1738 (West 1994). The district court refused to impose sanctions against Izadpanah, however, finding that the action was not frivolous.

II.

On appeal, Izadpanah[2] concedes that the district court did not have jurisdiction to review the state court decision for fraud on the court.[3] He argues, however, that the district court improperly granted summary judgment in favor of Defendants on his claims under §§ 1983 and 1985 as well as § 78j(b) and Rule 10b-5. After carefully considering the arguments of counsel and reviewing the record, we affirm the grant of summary judgment for the reasons adequately stated by the district court in its memorandum opinion. *Izadpanah v. Gross*, No. 94-1150 (E.D. Va. Nov. 1, 1994).

---

[2]Izadpanah assigned part of his rights to any judgment collected in this case to another entity, the 87 Aidant Limited Partnership. This partnership and several of its limited partners filed an application to intervene against Defendants below, *see* Fed. R. Civ. P. 24, but the district court granted summary judgment against Izadpanah before ruling on the application. The purported intervenors then filed a notice of appearance as intervenors with this court. Because the district court never ruled on the application to intervene, we treat the notice of appearance as a motion for leave to intervene and grant the motion. Since the intervenors merely have adopted the legal arguments advanced by Izadpanah, for ease of discussion we analyze the case by reference to the original parties.

[3]In his initial brief to this court, Izadpanah continued to argue that the district court had jurisdiction to review the state court decision for fraud. He abruptly withdrew this claim in his reply brief, however, stating, "Plaintiff has concluded that [his] argument is incorrect." Appellants/Cross-Appellees' Reply and Answering Brief at 2.

III.

On cross appeal, Defendants argue that the district court abused its discretion by refusing to order sanctions under Federal Rule of Civil Procedure 11. Generally, the decision to impose sanctions is within the broad discretion of the district court and will not be reversed on appeal absent an abuse of that discretion. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990). On appeal, however, Izadpanah conceded that his claim that a district court has jurisdiction to review a state court decision originated in a failure to properly consider *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), which precludes such review. Because the district court did not have the benefit of this concession, we remand this claim to the district court to determine whether sanctions should be imposed for bringing this cause of action.

AFFIRMED IN PART; REMANDED IN PART

Opinion of the District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

ALLEN A. IZADPANAH,)
Plaintiff)
v.)
EDWARD GROSS, ROBERT A. HUMMEL,)
CHARLES CROWE, and AIDANT, INC.)
Defendants)

CIVIL ACTION NO. 97-1150-A

MEMORANDUM OPINION

This matter came before the Court on Defendants' motion to dismiss for lack of jurisdiction, failure to state a claim upon which relief can be granted and for summary judgement. The Plaintiff asks for a Declaratory Judgment that the Virginia court had no jurisdiction to attach stock located in Maryland, and asserts that all subsequent court decisions were based on faulty jurisdiction and are thus void. The Complaint further alleges that the Defendants violated the securities and Exchange Act of 1934, as amended, and Va. Code Ann. § 13.1-522. Pendant state claims are asserted for fraud, stock fraud, fraudulent misrepresentation to the Circuit Court of Fairfax County, Virginia and abuse of process.

Procedural History

On May 3, 1991, Plaintiff's counsel signed a Consent Order agreeing that a judgement should be entered against the Plaintiff in favor of Sirex U.S.A., Inc. (hereafter "Sirex") in the amount of $21,997.05. This Consent Order was never appealed and is final. Attempts to collect on the Sirex judgement were unsuccessful.

In July of 1991 Federal Computer Corporation ("FCC"), pursuant to Virginia law,

purchased the Sirex judgement through an Assignment of Judgement accompanied by a Power of Attorney to sue from Sirex authorizing FCC and its attorney Mr. Gross to collect. FCC purchased this judgement hoping it might be useful to fend off future litigation by the Plaintiff. Since 1989, the Plaintiff has repeatedly sued FCC and its founder, Robert Hummel. All of the cased have since been dismissed.

The Plaintiff owned stock in Aidant, Inc., a closely held, private Virginia corporation along with Defendants FCC and Crowe as well as other investors. Fairfax County Circuit Court Judge Bach ordered Plaintiff's capital stock in Aidant, Inc. sold and the proceeds applied to his debt. The stock was sold after notice was given to interested parties including the Plaintiff. This Stock Turnover Order was never appealed and is final. Plaintiff's counsel sought to vacate the Stock Turnover Order and the sale of the stock. The same arguments which appear in this complaint were presented to Judge Bach of the Fairfax Circuit Court at a 1991 hearing on Appellant's Motion to Vacate the Stock Turnover Order. Judge Bach rejected challenges to 1) the Sirex Judgement; 2) the validity of the Stock Turnover Order, including jurisdiction of the court to issue and enforce this Order; 3) the adequacy of service of process and notice; 4) the method, manner, timing and outcome of the stock sale; and 5) the denial of Plaintiff's right to due process. Upon appeal, the Virginia Supreme Court found no reversible error and denied Plaintiff's appeal and petition for rehearing. Plaintiff filed no further appeal.

During these 1991 proceedings Plaintiff argued, as he does again before this Court, that the underlying Sirex debt had been paid in full. Thus, he concludes that the Consent Order was obtained fraudulently. The question of whether the debt has been paid has been fully and finally litigated before Judge Bach who found the debt still owing.

Defendants filed this motion to dismiss for lack of jurisdiction, failure to state a claim upon which relief can be granted and for summary judgement. This Court finds that it was the Fairfax Circuit Court's Order which caused the stock to be transferred. That Defendants' decision not to reveal FCC's identity as the creditor was not an act of fraud and provide no basis for the Plaintiff's allegations of a violation of federal and state securities acts. This Court further finds that it lacks jurisdiction to set aside the judgement of the state court. Finally, on principles of res judicata and collateral estoppel and because Plaintiff's claims are outside the statute of limitations, Plaintiff is improperly before this Court. Defendants' motion for summary judgement should be granted.

Grants of summary judgement motions are warranted if the pleadings, answers to interrogatories, admissions and affidavits show that there is no genuine issue as to any material fact and that the moving party will prevail as a matter of law. Celotex Corp. v. Catrett, 477 U.S 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

Lack of Jurisdiction

Plaintiff claims a violation of his Constitutional right of due process and seeks to have this Court overturn the 1991 consent judgement entered by the Fairfax Circuit Court. This Court lacks jurisdiction to overturn State court decisions. Rock v. United States, 912 F.2d 463 (1990). See also, District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) (U.S. District Courts lacked subject matter jurisdiction to review final determinations of state courts).

Plaintiff asks this Court to review the factual findings to determine if a fraud has been committed on the Fairfax Circuit Court. In Cleveland Demolition v. Azcon Scrap Corp., 827 F.2d 984 (1987), the Fourth Circuit Court of Appeals found that a routine evidentiary

dispute could not justify an action for fraud on the court as no verdict would ever be final. Id. The proper forum for determining whether a factual finding should be overturned is the court in which the determination took place, the Fairfax Circuit Court. Weisman v. Charles E. Smith Management, Inc., 829 F.2d 511 (1987).

Failure to State a Claim upon Which Relief can be Granted

Plaintiff argues that Defendants failed to reveal that the underlying debt was paid in full before securing a judgement. If as Plaintiff claims there was a fraud on the court, the proper forum for relief is the court allegedly defrauded. Defendant Gross, attorney for FCC, had no duty to inform the Plaintiff that ownership of the debt had been assigned to a new entity. Under Virginia law, the registration of assigned debts is permissive not mandatory. Va. Code Ann. § 8.01-452 (Michie 1952)("... there may be a notation of assignment...")(emphasis added). Defendants actions were proper under Virginia law and do not constitute fraud.

The Plaintiff also alleges abuse of process by attorney Gross in attempting to collect on a judgement over which the Plaintiff claims the court never had jurisdiction. The Fairfax Circuit Court found a valid debt and upheld the sale of Plaintiff's stock by the court. In Donohoe Const. v. Mount Vernon Associates, 369 S.E.2d 857 (Va. 1988), the Virginia Supreme Court stated that "A legitimate use of process to an authorized conclusion, even when carried out with bad intention, is not a malicious abuse of that process." Id. at 862 (cites omitted). That court further held that a malicious abuse of process claim required a showing of "an act in the use of the process not proper in the regular prosecution of the proceedings." Id. Even if assumed to be true, Plaintiff's contentions that the debt had been paid or

that Defendants had ulterior motives does not support an abuse of process claim.

Failure to State a Claim under 15 U.S.C. § 78 (Rule 10(b)5)

Plaintiff claims that the Defendants have violated the Securities and Exchange Act of 1934 and seeks to hold them liable under 15 U.S.C. § 78 and Rule 10(b)5. This claim is untimely, the Plaintiff lacks standing to assert this claim; and Plaintiff fails to set fourth circumstances for which 10(b)5 was intended to provide civil relief.

The statute of limitations period for claims under § 10(b) of the Securities and Exchange Act of 1934 is "'within one year after discovery of the facts constituting the violation and within three years after such violation.'" Howard v. Haddad, 962 F.2d 328, 330 (4th Cir. 1992), citing Lampt, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 111 S.Ct. 2773 (1991). Plaintiff's action was brought more than three years after the alleged fraudulent acts (between December 1990 and May 3, 1991) and more than one year after the acts were allegedly discovered (September 1992). Plaintiff's Complaint was filed August 29, 1994.

The "Birnbaum Rule" establishing standing to assert a private cause of action for alleged violations of the provisions of Rule 10(b)5 limits standing to cases in which the Plaintiff is a defrauded purchaser or seller of securities. Birnbaum v. Newport Steel Corp., 193 F.2d 461 (2d Cir. 1952), cert. denied 343 U.S. 956 (1952). Plaintiff did not participate in the sale of the stock and is not a defrauded seller. He lost ownership of the stock pursuant to the Stock Turnover Order entered by the Fairfax Circuit Court.

Plaintiff attempts to classify himself as a forced seller. Generally the forced seller doctrine applies in cases resulting from a merger and to shareholders that were fraudulently forced to sell their stock. See Issen v. GSC Enterprises, Inc., 508 F.Supp.

1278 (N.D.Ill. 1981); Mosher v. Kane, 784 F.2d 1385 (9th Cir. 1986). Plaintiff has not established that he was a forced seller under the Birnbaum Rule and therefore lacks standing for a private cause of action.

Failure to State a Claim under 42 U.S.C. §§ 1983 and 1985

The Plaintiff claims that his rights under 42 U.S.C. § 1983 and § 1985 were violated when he was deprived of his property (his stock in Aidant, Inc.) by the Defendants and the Virginia courts without due process of law. These claims are untimely and barred by the Statute of Limitations. In addition, Defendants are not the proper Defendants under these statutes.

These claims are barred by the statute of limitations. The United States Supreme Court has held that claims under § 1983 are best characterized as personal injury claims for limitations purposes. Wilson v. Garcia, 471 U.S. 261, 276-78 (1985). The appropriate state statute of limitation controls for claims under § 1985 as well, unless inconsistent with federal law. Burnett v. Grallan, 468 U.S. 42 (1984). In Virginia, the statute of limitations for these actions is two years. In the case of Clay v. Yates, 809 F.Supp. 417, 426 (E.D.Va. 1992) the court stated that "time limitations for actions brought under 42 U.S.C. ●77 1983 are borrowed from state law ..." [and] that the limitation is two years in Virginia. The alleged violations of §§ 1983 and 1985 occurred more than three years prior to the filing of Plaintiff's complaint.

42 U.S.C. § 1983 and 1985 were enacted to prevent people from conspiring to interfere with certain individual rights. The undisputed evidence demonstrates nothing more than Defendants executing on a valid final judgement pursuant to constitutional state law procedures. Such lawful pursuit does not state a § 1983 or § 1985 claim.

Failure to State a Claim under Va. Code Ann. § 13.1-522 (Michie 1992)

In Counts II and III and other portions of the Complaint, Plaintiff contends that Defendants committed acts and conducted a sale of stock which allegedly violates Va. Code Ann. § 13.1-522 (Michie 1992). Plaintiff's claim must fail as it is time barred and as this section was not intended to provide a civil remedy to Plaintiff.

Va. Code Ann. § 13.1-522(D) (Michie 1992) provides for a two years statute of limitations. Plaintiff alleges that the acts which constitute the alleged violations occurred between December 1990 and the Fall of 1991. Even if the statute is read so it does not accrue until the Plaintiff knew of the allegedly improper turnover, it is clear that the Plaintiff knew of the turnover in the Fall of 1991 as he moved to vacate the Judge's Order on November 1, 1991.

In addition, Plaintiff fails to state a cause of action under § 13.1-522. This section was enacted to provide a defrauded purchaser of securities a civil remedy. Plaintiff is not a defrauded purchaser of securities; he was not even a participant in the sale of stock.

Motion for Summary Judgement

Res Judicata/Collateral Estoppel

Plaintiff has already litigated claims made in his Complaint. Under the principles of res judicata and collateral estoppel, parties are precluded from "relitigating issues that were or could have been dealt within an earlier litigation." Betances v. Quiros, 603 F.Supp. 201, 205 (D. Puerto Rico 1985), quoting Angel v. Bullington, 330 U.S. 183 (1947). The Full Faith and Credit principle provides that State court decisions have the same preclusive effect in Federal courts as in State courts. Bennun v. Board of Governor of Rutgers, 413 F.Supp. 1274, 1278 (D.N.J. 1976). The Virginia courts have ruled on these issues and ". . . [s]ection 1983 does

not authorize a litigant to relitigate in a federal forum an issue already determined by a state court." Concordia v. Bendekovic, 693 F.2d 1073, 1077 (11th Cir. 1982). Additionally, if the claim is one that should have been resolved in a previous lawsuit, it will be precluded. Keith v. Aldridge, 900 F.2d 736, 740 (4th Cir. 1990). Since the Plaintiff has had an opportunity to litigate the following issues repeated in his Complaint, the Defendants' motion for summary judgement should be granted.

Plaintiff's claim of lack of jurisdiction of the court over his stock has been litigated in the Fairfax Circuit Court, denied appeal by the Virginia Supreme Court, and denied Writ of Certiorari by the United States Supreme Court. This question has been fully litigated and cannot be reopened now.

Plaintiff has already litigated the issue of improper service. His motion to vacate was denied as was his appeal to the Virginia Supreme Court. The same arguments were made and rejected when the U.S. Supreme Court denied his Writ of Certiorari.

In his Motion to Quash and Motion for Reconsideration before the Fairfax Circuit Court, Plaintiff argued that the defendants had committed various frauds in connection with the Virginia judicial system, i.e., that his attorneys were fraudulently induced into signing the Consent Judgement, that the court was fraudulently employed to strip the Plaintiff of his stock, that Mr. Gross misrepresented his client's identity and the fact that the debt was due and owing. The motions were denied by the Fairfax Circuit Court, Plaintiff's second appeal to the Virginia Supreme Court containing the same allegations was denied, and Plaintiff's petition to the United States Supreme Court arguing the same allegations was denied. As such, Plaintiff's claims have been fully and finally decided.

The same claim in Plaintiff's present complaint, that Defendants violated state and

federal securities laws, has been rejected by the Fairfax Circuit Court, and appeals denied by the Virginia Supreme Court and the U.S. Supreme Court. Thus, the question of any violation of Federal and State securities laws has already been decided. Plaintiff is precluded from bringing any action based on violation of federal or state securities laws whether he was aware of them at the time of the original litigation or not. It is the existence of the claim not the awareness of it that controls. Keith, 900 F.2d at 740. The Plaintiff raised this very claim at trial and lost. The decision was unsuccessfully appealed to the Virginia and United States Supreme Courts.

For these reasons, Defendants' motions should be granted. An appropriate order shall issue.

Claude M. Hilton
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
November 1, 1994

Order of District Court Denying Motion to Alter and Amend

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

ALLEN IZADPANAH)
Plaintiff,)
)
EDWARD GROSS, ROBERT A.)
HUMMEL, CHARLES CROWE,)
and AIDANT, INC.,)
Defendants.)

Civil Action No. 94-1150-A

Order

This matter came before the Court on Plaintiff's Motion to Amend and Alter judgement and on Defendants' Motion for

Sanctions, fees and costs under Rule 11 of the Federal Rules of Civil Procedure and 28 U.S.C. § 1927. The Court finds its previous ruling correct for reasons then stated and that the Motion to Intervene and the Motion to Amend the complaint were not timely noticed and before the Court for disposition at the time of the Court's ruling. The Court further finds that this action was not filed for an improper purpose and does not find this action frivolous in nature. It is hereby

ORDERED that the Plaintiff's Motion to Amend and Alter judgement is DENIED and Defendants' Motion for sanctions, costs and fees is DENIED.

Claude M. Hilton
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
December 2, 1994

Order of Court of Appeals Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED February 27, 1996

No. 95-1163
CA-94-1150-A

ALLEN A. IZADPANAH
Plaintiff - Appellant

87 AIDANT LIMITED PARTNERSHIP; FRED A. PAGE; TERRY PAGE; DOUGLAS STUP; EARL M. CUNARD; JANICE A. CUNARD; CRAFT INDUSTRIES, for the Benefit of Rudy Delsack;
Appellants

v.

EDWARD GROSS; ROBERT A. HUMMEL; FEDERAL COMPUTER CORPORATION; CHARLES CROWE; AIDANT, INCORPORATED
Defendants - Appellees

No. 95-1246
CA-94-1150-A

ALLEN A. IZADPANAH
Plaintiff - Appellee

v.

EDWARD GROSS; ROBERT A. HUMMEL; CHARLES CROWE; AIDANT, INCORPORATED
Defendants - Appellants

and

FEDERAL COMPUTER CORPORATION
Defendant

ORDER

Appellants have filed a petition for rehearing. The Court denies the petition for rehearing.

For the Court,
Bert M. Montague
CLERK

Rule 10b-5 of Securities and Exchange Commission

It shall be unlawful for any person, directly or indirectly, by the use of any means of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Section 18.2-499. Combinations to injure others in their reputation, trade, business or profession; rights of employees.

A. Any two or more persons who combine, associate, agree, mutually undertake or concert together for the purpose of (i) willfully and maliciously injuring another in his reputation, trade, business or profession by any means whatever or (ii) willfully and maliciously compelling another to do or perform any act against his will, or preventing or hindering another from doing or performing any lawful act, shall be jointly and severally guilty of a Class 1 misdemeanor. Such punishment shall be in addition to any civil relief recoverable under Section 18.2-500.

B. Any person who attempts to procure the participation, cooperation, agreement or other assistance of any one or more persons to enter into any combination, association, agreement, mutual understanding or concert prohibited in subsection A of this section shall be guilty of a violation of this section and subject to the same penalties set out in subsection A.

C. This section shall not affect the right of employees lawfully to organize and bargain concerning wages and conditions of employment, and take other steps to protect their rights as provided under state and federal laws.

Section 18.2-500. Same; civil relief; damages and counsel fees; injunctions.

(a) Any person who shall be injured in his reputation, trade, business or profession by reason of a violation of Section 18.2-499, may sue therefor and recover three-fold the damages by him sustained, and the costs of suit, including a reasonable fee to

plaintiff's counsel; and without limiting the generality of the term "damages" shall include loss of profits. Such counsel shall in no case receive any other, further or additional compensation except that allowed by the court and any contract to the contrary shall be null and void.

(b) Whenever a person shall duly file a bill in chancery in the circuit court of any county or city against any person alleging violations of the provisions of Section 18.2-499 and praying that such party defendant be restrained and enjoined from continuing the acts complained of, such court shall have jurisdiction to hear and determine the issues involved, to issue injunctions pendente lite and permanent injunctions and to decree damages and costs of suit, including reasonable counsel fees to complainants' and defendants' counsel.

State Court Injunction Order

VIRGINIA:
IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

ALLEN I. IZADPANAH	)	
	)	
versus	)	At Law #103819
	)	
ROBERT A. HUMMEL, et al.	)	

INJUNCTION ORDER

UPON CONSIDERATION of Defendants Motion for Temporary Injunctive Relief, and after hearing argument of Counsel, it is hereby

ORDERED, ADJUDGED and DECREED that Plaintiff Allen A. Izadpanah, and his representatives, agents and attorneys, and Defendants, and their representatives, agents and attorneys, are enjoined, until such time as this Court decides the issue of whether the

Aidant, Inc. Board of Directors is controlled by Plaintiff Izadpanah or controlled by Charles F. Crowe and Defendants Robert A. Hummel and Federal Computer Corp., from

1) continuing to prosecute the claims made in At Law # 91017, At Law #103819 and At Law #103820; and
2) acting in any matter as a shareholder, officer, or director of Aidant, Inc., and specifically from calling or conducting any meetings of the Board of Directors or shareholders, filing any lawsuits, proceeding with law suits, filing any Petition in Bankruptcy, initiating liquidation proceedings or taking any action on behalf of or in the name of Aidant, Inc.,

without first obtaining leave of Court.

Date: 8/7/92 Enter: M. Bruce Bach
Circuit Judge

Excerpts from State Court Transcripts

CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

November 6, 1992

The Court: What's going on in that case other than trying to collect the money?

Mr. Gross: That's it.

Mr. Benzinger: What's going on is deception from the beginning to the end, Your Honor, and that's what we're concerned about.

We see this document that says this was paid in full in December of '90. I think we have every reason to question that.

Again--

Mr. Gross: (Interposing) That document--

Mr. Benzinger: (Interposing) Just a minute, sir.

Mr. Gross: (Continuing) That document, first of all, is not in evidence. It's a hearsay document. I can tell you that that is

from the collection agency that initially sent me the case way back when.

They closed the case because they decided it was uncollectible. I kept it open, because I thought it was collectable and, in fact, did collect a great deal of money on that case and that's the document they're returning. Ken Michaels is the collection agency.

That's totally irrelevant to why they didn't they file a motion of something saying, "We have this document. We believe that this judgment was paid. We think we're entitled to a hearing," as opposed to without any hearing set, without any motion, without anybody knowing why, suddenly, on a Thursday, I have a sheriff come to my office and serve me personally with a subpoena to appear at two hearings that don't exist and by a judgment debtor in a case.

That's what we're here for, not the issues of whether this judgment was validly assigned or who was acting under powers of attorney and who isn't.

Let me give you my power of attorney just to assure you that I was acting properly.

Mr. Benzinger: Oh, naturally.

Mr. Gross: And here are the case law regarding assignments of judgment as they clearly indicate that there is no requirement-

Mr. Benzinger: (Interposing) May I see that?

Mr. Gross: (Continuing)--to notify the judgment debtor of anything regarding the assignment.

(Handing to the Court)

The only risk we take is that the judgment debtor will directly pay the original creditor in which case that will be considered satisfactory.

We didn't see that as a risk in this case.

****

The Court: as far as -- well, I won't give all my reasons except basically the reasons stated by them. I can understand how Izadpanah or you all would be interested in

knowing all these things you want to know, but I mean, I just don't think -- I think this case is over, long gone. It's just a question now of collecting the money.

November 20, 1992

Mr. Benzinger: Your Honor, with all due respect, I don't believe that the sanctions sought with respect to the subpoenas have this breadth. This is merely attempting to throw oil on the fire. They wanted a sanction for us having issued a subpoena, and Your Honor quashed the subpoenas and said there would be sanctions.

Now, they are accusing me particularly of all kinds of things that they don't have any proof of, and I think it is unfair.

The Court: Objection sustained. It seems to me all we dealt with was the cost of defending those subpoenas last time; but maybe I am wrong, but I don't think so.

March 9, 1993

Mr. Benzinger: One moment, please, Your Honor. The insistence on extending and making permanent Judge Bach's injunction is not a matter that Your Honor should consider.

I think that is Judge Bach's decision, even though Your Honor has graciously agreed to take this burden off Judge Bach's shoulders. But, if Your Honor is considering that, consider this: Why do they want this?

We have been enjoined from August of 1991 from initiating an equity suit to have Judge Bach's turnover order vacated because of the fraud. We intend to do that. we announced that early and often.

Since August of 1992, we learned the following: This judgment was bought back in July of '91 and that all of these enforcement actions against Mr. Izadpanah were, in fact, FCC's activities.

FCC is a shareholder in Aidant, and FCC bought this judgment--

The Court: Let's not get into your new case.

Mr. Benzinger: What I am suggesting is that I want to be able to bring that to this Court's attention and tell that whole story and let the Court decide that.

****

The Court: All right. I am going to do this: I am going to deny your motion to reconsider, and I think that that's the only issue that's been put four-square before me, and I will sign an order dismissing that case and you can note your appeals.

As to the other issues, what I would like from you, Mr. Benzinger, taking that decision that I have just rendered today, that appears to me to eliminate any shareholder meeting that might have changed the board of directors..

I agree with you that, even after that, Mr. Izadpanah retains his stock until we get up to whatever time the Syrex thing began. You can file whatever equity suit you are going to file on that, but before you file the suit,, I would like at least a presentation of your Bill of Complaint to the Court.

Let's have a hearing to determine whether this is a new issue or whether it is duplicative of any other issues that have been previously decided. Following that, whatever is left, you can file.

****

Mr. Benzinger: I think what Mr. Kurz asked you is if the Boeing joint venture case is dismissed, and I think the response was in the affirmative.

I don't think that's--that is not contemplated by the motion to reconsider and not contemplated by your letter opinion.

The Court: What I have determined today is precisely what I said: That Mr. Izadpanah, after April 1, was a mere stockholder. He was not a majority one.

Mr. Benzinger: Right.

Mr. Kurz: The final order should say the motion for reconsideration is denied?

The Court: Yes, sir.

March 23, 1993

The Court: I will sign the defendants' proposed orders one and two, four and six, deny Mr. Izadpanah's order which is listed as number five on the injunction. I will simply lift the order of injunction.

Mr. Benzinger and Mr. Charlton can file whatever suits they want. I will sign an order of limitation, the only limitation being that they must not duplicate prior suits.

Mr. Kurz: Your honor,1 as I understand it, they're also required to submit any prior suits to this Court before filing.

The Court: Yes, sir.

Mr. Benzinger: Thank you.

****

Mr. Charlton: Your Honor, before you leave, may I have a point of clarification? I'm unsure of one point--

The Court: yes, sir.

Mr. Charlton: -- that may affect me. Your Honor, I have in preparation right now a federal lawsuit alleging, among other things, stock fraud and attacking the actions of some of these attorneys. I presume that your order of submission-- and also raising constitutional issues, federal constitutional issues.

I haven't made a final decision to file this yet in asking for injunctive relief.

The Court: I'm not sure how I would have any jurisdiction to stop you from filing anything.

Mr. Charlton: Your Honor, thank you. I needed to hear that. Thank you.

March 30, 1993

The witness (Edward Gross):

A. I did not say that I was hired by the collection agency. It was sent to me through a collection agency.

Q. And what was the collection agency.

A. Again, I don't see the relevancy of that.

Q. Was it Millikan and Michaels?

A. I am going to object to relevancy.

The Court: How is it relevant?

Mr. Benzinger: Well, I have documents that I am going to introduce from Millikan and Michaels that shows that this debt was paid in December of 1991.

The Witness (Edward Gross): Again, Your Honor, I am going to object. If we are going to go behind this judgement, and start looking through all of this again, we are going to be here three or four days.

The Court: Objection sustained.

****

The Court: ... I think I have already decided in the previous hearing that the subpoenas were improperly issued for the reasons stated, and that all we are here today for is to decide what is a reasonable amount of sanctions, and one way to look at that would be what attorneys fees there are.

****

Mr. Benzinger: ... What is on the docket today is a 271.1 motion against me, and perhaps Mr. Charlton for the filing of the subpoenas, and nothing else.

The Court: I agree with that.

(2)

Supreme Court, U.S.
FILED
JUL 1 1996
CLERK

No. 95-1938

In The

Supreme Court of the United States

October Term, 1995

ALLEN A. IZADPANAH, *et al.*,

Petitioners,

vs.

EDWARD GROSS, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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29 pp

QUESTIONS PRESENTED

1. Whether the courts below properly ruled that the federal district courts have no jurisdiction to overturn prior state court decisions that have already been unsuccessfully appealed through the United States Supreme Court.

2. Whether the courts below properly ruled that state court rulings are entitled to full faith and credit in the federal district courts, and therefore cannot be ignored nor set aside for the benefit of a disgruntled state court litigant attempting to retry his case in federal district court.

3. Whether the courts below properly ruled that the doctrines of claim and issue preclusion bar relitigation in federal district court of issues already tried and decided in prior state court proceedings.

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STATEMENT OF THE CASE

The Petitioner's case rests entirely upon his unsupported *factual* claim that somehow, without ever paying a penny, his confessed judgment debt was mysteriously "paid in full." The United States District Court for the Eastern District of Virginia (hereafter referred to as the "trial court") found no merit in this tale, summarily dismissing the case, and in so doing holding that this case was "improperly before the court," finding that:

> The question of whether the debt has been paid has been fully and finally litigated before [Virginia State Circuit Court] Judge Bach *who found the debt still owing.*

Appendix To The Petition For Writ of Certiorari, p. 7 (hereafter cited as "App. p.__") (emphasis added).

This trial court decision was based upon undisputed evidence that the Petitioner has already litigated his case fully in the Virginia state courts. There he previously, unsuccessfully argued the precise issues resurrected in his current case, ultimately petitioning this Court for a Writ of Certiorari. *Benzinger v. Sirex, USA, Inc.*, No. 93-1870 (U.S. 1993 Term). When his 1993 Petition for a Writ was denied, the Petitioner's case was fully, finally litigated. But this elementary tenet of law proved no deterrent, for the Petitioner simply refiled his case in the United States District Court seeking a different outcome from the federal judiciary.

Given the state court history, the Respondents moved for summary dismissal of this federal case on various theories including lack of jurisdiction, failure to state a claim, *res judicata*, and collateral estoppel. Additionally, Respondents established from simple citation to the law that the Petitioner's

claims were barred by applicable statutes of limitations. Crediting each of the Respondents' arguments, the trial court summarily dismissed the case, and this dismissal was upheld when challenged before the Fourth Circuit Court of Appeals.

REASONS FOR DENYING THE WRIT

I.

INTRODUCTION

Mirroring his previous pleadings, the Petitioner's petition to this Court offers a tale of fraud, treachery and deceit which takes the unorthodox form of a narrative. The Petitioner's *Statement of Case* (pp. 1-8) sets the foundation for his claims but does not contain one single citation to evidence in the record; rather, the narrative cites to the Petitioner's prior *allegations.* Moreover, nowhere does the Petitioner acknowledge the heavy burden he must bear when seeking to overturn the factual determinations of the trial court, and nowhere is there any argument or authority offered to support a conclusion that the trial court has abused its discretion.

The Petitioner's appeal seems founded on the supposition that fraud allegations supported by a speculative narrative suffice to establish *material* issues of contested fact which can withstand summary dismissal, and which must be afforded a hearing. To the contrary, a case based upon speculation and assumption not only fails to merit a hearing, it fails to pass muster under the prefiling investigation requirements of Federal Rule of Civil Procedure 11. The skepticism with which the Petitioner's case was viewed by the Fourth Circuit Court of Appeals is plainly evidenced in their opinion, which partially remanded the case solely for further consideration of sanctions against the Petitioner's attorneys. (App. p. 5). On remand, the trial court in fact did levy sanctions against all counsel for Petitioner for fees in the amount of $61,828.25, and expenses in the amount of

$5,040.52. *See* Order and Memorandum Opinion attached hereto as Appendix A.

II.

NO COMPELLING REASON TO GRANT CERTIORARI UNDER RULE 10

Rule 10 of the Rules of the Supreme Court states that a Petition for Writ of Certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. However, such alleged errors are the only type asserted by Petitioners. Petitioners's first question presented is "Whether the courts below misconstrued the facts of the case." The remaining questions presented either restate the first or contend a misapplication to a properly stated rule of law.

Petitioners do not assert any compelling reason as to why the United States Supreme Court should grant Petitioner's Petition for a Writ of Certiorari. The Petitioner does not contend that the Fourth Circuit Court of Appeals entered a decision which conflicts with the decision of another United States Court of Appeals or is in conflict with a decision by a state court of last resort. Moreover, the Petitioner has failed to put before this Court any important federal question that conflicts with decisions made by this Court. Applying the considerations governing review of certiorari set forth in Rule 10 of the Rules of the Supreme Court, Petitioner's Petition for a Writ of Certiorari does not warrant this Court's review.

III.

LACK OF JURISDICTION

The primary objective of the *Complaint* (and the proposed *Amended Complaint*) was reargument of factual and legal

determinations of Virginia's state courts.[1] To escape the conclusive effect of those final state court determinations, the Petitioner shifted venue to the federal courts and attempted to turn a routine evidentiary dispute — whether his confessed judgement debt was ever paid — into a cause of action for fraud. He asked the federal courts to relitigate the debt question, overturn state court rulings holding that the debt was unpaid, and thereafter hold that fraud had been committed upon the Virginia courts. If allowed to proceed in this manner, the Petitioner reasoned, then the trial court would have the power to set aside Virginia state court findings and orders.

Recognizing the Petitioner's improper motivation, the trial court refused to hear this case, stating:

> Plaintiff claims a violation of his Constitutional right of due process and seeks to have this Court overturn the 1991 Consent judgement entered by the Fairfax Circuit Court. This Court lacks jurisdiction to overturn State court decisions.
>
> . . .

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1. The Petitioner's petition makes much of the fact that the trial court did not issue a separate written opinion detailing the reasons for denying his motion for leave to file an Amended Complaint. This issue is a "red herring." The Amended Complaint is simply a factual rehash of the Complaint, with several new legal theories, all of which require reversal of prior state court decisions. This point was fully briefed to the trial court, which would not allow the Petitioner to use the artifice of "amending" his Complaint to defeat summary judgement. The Petitioner argued his case fully in his *Motion To Alter or Amend Judgement*, but the trial court rejected the argument. (App. pp. 14-15).

> Plaintiff asks this Court to review the factual findings to determine if fraud has been committed on a [sic] the Fairfax Circuit Court . . . The proper forum for determining whether a factual finding should be overturned is the court in which the determination took place, the Fairfax Circuit Court.

App. pp. 8-9 (citations omitted).

This decision was upheld by the United States Fourth Circuit Court of Appeals, which had previously held in *Rock v. United States*, 912 F.2d 463 (4th Cir. 1990):

> Federal courts have no jurisdiction over challenges to state court decisions, and in particular, over cases arising out of judicial proceedings, even if the state court action is alleged to be unconstitutional.

Id. (emphasis added).

The *Rock* case followed this Court's precedent set in *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 75 L. Ed. 2d 206 (1983), which held that the federal district courts lack subject matter jurisdiction to review final determinations of state courts; noting, however, that such review is available in the United States Supreme Court. [2]

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2. As noted above, the Petitioner did in fact avail himself of a United States Supreme Court appeal in 1992 after unsuccessfully pursuing his state court remedies through the Virginia Supreme Court, but this Court denied the previous Petition for a Writ of Certiorari.

In *Feldman,* citing *Dasher v. Supreme Court of Texas,* 658 F.2d 1045 (5th Cir. 1981), Justice Brennan wrote:

> If the constitutional claims presented to a United States district court are inextricably intertwined with the state court's denial in a judicial proceeding ..., then the district court is in essence being called upon to review the state-court decision. This the district court may not do.

District of Columbia Court of Appeals v. Feldman, supra, 460 U.S. at p. 1315.

Explaining an important corollary to this point, *Clark v. Clark,* 984 F.2d 272 (8th Cir. 1983), emphasizes that federal courts are not a forum for relitigating adverse state decisions. Moreover, the *Clark* case rejects the Petitioner's repeated attempts to equate lack of a written opinion denying his fraud claims with a denial of adjudication, explaining that:

> Plaintiff may not relitigate the issues that have thus been determined against her. . . . Courts frequently reject by implication arguments urged by parties. . . . The state courts' opinions' failure to mention plaintiff's federal constitutional arguments means only that those courts did not consider the arguments substantial. The doctrines of claim and issue preclusion prevent relitigation of wrong decisions just as much as right ones.

Id. at 273.

As the trial court noted (App. pp. 8-9), *Cleveland Demolition v. Azcon Scrap*, 827 F.2d 984 (4th Cir. 1987), rejects the notion that a losing party — such as the Petitioner in this case — can retry an unfavorable evidentiary determination through the artifice of filing an independent fraud action:

> If a routine evidentiary dispute, which occurs in virtually all trials, could justify an action for fraud on the court, then any losing party could bring an independent action to set aside the verdict, forcing extended proceedings in almost every case . . . Thus, . . . no verdict would ever be final until a second proceeding was held to determine if there was a fraud on the court ... [E]videntiary conflicts must be resolved during the initial trial.

Id. at p. 987.[3]

If allowed to proceed here the Petitioner would effectively be receiving another opportunity to litigate matters fully and finally litigated when this Court denied his first Petition for a Writ of a Certiorari in 1992. The lower federal courts rejected this attempt. Those rulings are grounded in long established precedent and should not be overturned.

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3. The Complaint in *Cleveland Demolition* alleged fraud against the opposing parties *and* their attorney. Rule 11 sanctions were imposed for this tactic, in part because of the "potentially devastating impact upon professional reputations" which speculative fraud allegations against the attorney carried with them. The *Complaint* in this case likewise leveled speculative fraud allegations against opposing counsel, naming counsel as a party defendant. Rule 11 sanctions against Petitioner's counsel were initially denied, but upon remand from the Fourth Circuit Court of Appeals, the trial court levied sanctions against all counsel for Petitioners for fees in the amount of $61,828.25, and expenses in the amount of $5,040.52.

IV.

FEDERAL AND STATE SECURITIES LAW CLAIMS (THERE IS NO INJUNCTION TOLLING THE STATUTE OF LIMITATIONS).

Throughout his petition, and particularly with respect to the securities law claims (*e.g.*, App. pp. 18-20), the Petitioner suggests that a *state court* injunction somehow prevented him from filing his federal action, thereby tolling the applicable statutes of limitations. In his novel construction of the facts and law, the Petitioner fails to address these important specifics which were fully briefed to the United States District Court: (1) the cited injunction, by its very terms, has no application whatsoever to a personal action by the Petitioner, such as this one (App. p. 18-19); and (2) in early *1993* Petitioner's counsel clarified with the state court that the state court injunctions would not preclude a federal action. (App. p. 23).

Even a cursory review of the cited injunction makes clear that the Petitioner is only enjoined from: (1) pursuing three identified state court cases, or (2) acting *on behalf of,* or pursuing claims *in the name of,* Aidant, Inc. (App. pp. 18-19). The Petitioner in this case is neither pursuing any of the three specified state court actions, nor is he acting on behalf, or in the name, of Aidant, Inc.; rather, in this latest case he is suing in his individual capacity. Therefore, even assuming for the purposes of argument that this state court injunction could stop him from filing a federal suit covered by its limited terms, it has no application whatsoever to *this* suit because this suit falls outside the scope of the injunction. Elementary legal reasoning dispels the unsupported tolling argument, and the trial court was therefore entirely correct in disregarding it and finding that the statutes of limitations applicable to Petitioner's claims ran unabated.

A. Failure To State A Claim Under 15 U.S.C. § 78 (Rule 10b-5)

Throughout the *Complaint,* specifically in Count II, the Petitioner claims that Respondents violated the Securities and Exchange Act of 1934. Petitioner seeks to find Respondents liable under 15 U.S.C. § 78, Rule 10b-5 (hereinafter "Rule 10b-5"). The trial court dismissed these claims because they are barred by the statute of limitations, because the Petitioner lacks standing to assert a claim, and because Petitioner fails to set forth circumstances for which Rule 10b-5 was intended to provide civil relief. (App. pp. 10-11).

1. *Statute of Limitations*

The statute of limitations for a Rule 10b-5 violation requires "the action to 'be commenced within one year after the discovery of the facts constituting the violation *and* within three years after such violation.' " *Howard v. Haddad,* 962 F.2d 328, 330 (4th Cir. 1992) (emphasis added). The Petitioner's claim fails under *both* requirements.

The *Complaint* itself establishes that the alleged fraud occurred over three years ago, because it alleges that the actions constituting a violation of Rule 10b-5 occurred between December 1990 and May 3, 1991, when Respondents allegedly concluded their fraudulent scheme to induce the Petitioner to agree to the *Consent Order* for a debt they knew to be satisfied. (App. p. 6). Petitioner filed the present lawsuit on August 29, 1994, more than three years after he agreed to the May 3, 1991 *Consent Order.* Given the specific allegations of the *Complaint* itself, there is no credible argument that the trial court abused its discretion when finding that the alleged fraudulent acts occurred more than three years before its filing. (App. p. 10).

The Petitioner now offers semantic gymnastics, attempting to refute his own allegations in the *Complaint* by arguing that the "pattern of fraudulent conduct" persisted until August 29, 1991, and therefore his claim is timely. But the Respondents took no action on that date. August 29, 1991 is the date on which the Virginia state *court* issued the *Stock Turnover Order,* which is discussed in the trial court's opinion at App. p. 7. Neither the Commonwealth of Virginia nor any of its agents are named as defendants in this case. Therefore, Petitioner's attempt to transform the state court's August 29, 1991 action —enforcing a confessed judgement — into a pattern of fraudulent conduct which tolled the statute of limitations is neither credible nor consistent with his own *Complaint.*

Moreover, the Petitioner's claim was not brought within one year after discovering the alleged fraud. The *Complaint* itself alleges that: "In September 1992 Petitioner first learned of parts of the subterfuge and artifices by which he had 'lost his stock'." This admission places his case outside the one year limitation. Further, the trial court made a specific factual determination that the Plaintiff knew the facts giving rise to his fraud claims in 1991. (App. p. 7). This finding is based in part upon the Petitioner's **1991** state court pleading admissions, where he alleged that:

> Certainly, any activity involving trust funds of Aidant, Inc. and dealings in the stock of Aidant, Inc. and held by Messrs. Crowe, Hummel, et al., and held for their own personal benefit with Sirex, does nothing but compound the complexity of the *fraud* charged . . .

(Emphasis added). The trial court properly held, therefore, that the Petitioner failed to commence his action within one year of his discovery of the alleged violation, or three years of the events

giving rise to the alleged violation, and his Rule 10b-5 allegations are barred by the statute of limitations. *Id.*

2. *Lack of Standing*

Rule 10b-5 was established to protect investors from market manipulation, not as a means to challenge state court debt collection procedures. Petitioner's action is in truth a challenge to the findings and orders of the Virginia judiciary (and by extension to the ruling of this Court denying a Writ in 1992). Rule 10b-5 was not promulgated to permit a civil cause of action under these circumstances.

The Petitioner seeks to establish standing by invoking the so-called "Birnbaum Rule" which confers standing on individuals, in limited circumstances, to assert a private cause of action under Rule 10b-5. *See Birnbaum v. Newport Steel Corp.*, 193 F.2d 461 (2nd Cir. 1952), *cert. denied*, 343 U.S. 956 (1952). The "Birnbaum Rule" limits standing to a defrauded purchaser or seller of securities.

The Petitioner makes no claim to be a purchaser, rather, he claims to be a defrauded "seller" of his stock. But as the trial court held, Petitioner was not a seller of securities, nor even a participant in the sale of stock: "He lost ownership of the stock pursuant to the Stock Turnover Order entered by the Fairfax Court." (App. p. 10).

Further, the Petitioner's attempt to classify himself as a "Forced Seller" of stock finds no support. The "Forced Seller" concept applies in cases resulting from merger and to shareholders fraudulently forced to sell their stock. *See, e.g., Mosher v. Kane*, 784 F.2d 1385 (9th Cir. 1986). Here there is no merger, and the Petitioner is not a seller for he did not even participate in the stock sale. The glaring, undisputable fact which

the Petitioner has consistently ignored, but which every court has recognized, is that the Petitioner had absolute control over his stock — if he simply paid his legitimate debts he would have his stock today. He *chose* not to pay. Hence, "Plaintiff has not established that he was a forced seller under the Birnbaum Rule and therefore lacks standing for a private cause of action." App. p. 11.

B. Failure To State A Claim Under 42 U.S.C. §§ 1983 And 1985

Without ever explaining precisely how, the *Complaint* concludes that the Respondents have violated two federal civil rights statutes: 42 U.S.C. § 1983 and § 1985. The trial court held that these claims fail to state a cause of action because the claims are barred by the statute of limitations, and the Respondents are not proper defendants.

1. *Statute of Limitations*

The *Complaint* alleges that the Petitioner's loss of stock represents a deprivation of property without due process of law in violation of §§ 1983 and 1985, with the culminating event being the Virginia state court's *Stock Turnover Order* of August 29, *1991*.

The trial court's holding that these claims are barred by the statutes of limitations cannot be seriously disputed. (App. p. 11). Even if this Court credits the Petitioner's argument that the statutes did not begin to run until he knew of the allegedly fraudulent acts, the trial court has made a specific factual determination that he knew of his loss of stock by November 1991 when he moved to vacate the *Stock Turnover Order*, as fully discussed *supra*, and this finding is unequivocally supported by the Petitioner's own admissions. Because the Petitioner failed to

commence his action within two years of that date, his civil rights claims are barred by the statute of limitations, for as the trial court wrote:

> The United States Supreme Court has held that claims under § 1983 are best characterized as personal injury claims for limitation purposes. *Wilson v. Garcia*, 471 U.S. 261, 276-78 (1985). The appropriate state statute of limitation controls for claims under § 1985 as well . . . In Virginia, the statute of limitations for these actions is *two* years. . . .

App. p. 11 (emphasis added).

2. *Failure to State a Claim*

The civil rights statutes cited by the Petitioner were simply not designed to provide a mechanism to collaterally attack a state court's judgement enforcement proceedings. Petitioner cites no authority, and alleges no specific facts, to support a violation by these Respondents. Because his attack is in actuality levelled against the Virginia judiciary which entered the *Stock Turnover Order* — and which refused each of his many challenges to that order — to present even a colorable claim the Petitioner would have had to allege some improper state action to support his civil rights claims, but he has alleged no improper state action and has named neither the State nor its agents as parties. The trial court therefore properly ruled that:

> 42 U.S.C. §§ 1983 and 1985 were enacted to prevent people from conspiring to interfere with certain individual rights. The undisputed evidence demonstrates nothing more than defendants executing on a valid

> final judgement pursuant to constitutional state law procedures. Such lawful pursuit does not state a § 1983 or § 1985 claim.

App. p. 11.

C. Failure To State A Claim For State Law Fraud Claims

The Virginia state courts found that the Petitioner's underlying judgement debt was never paid, and the United States District Court properly gave full faith and credit to this decision. Because each of the *Complaint's* state law fraud and abuse of process claims depend upon the erroneous factual premise that the debt was paid, they were properly dismissed. (App. pp. 12-14).

V.

SUMMARY JUDGMENT

Res Judicata/Collateral Estoppel

After concluding that this case should be dismissed for two separate and distinct reasons — the court lacked jurisdiction, and the *Complaint* failed to state a claim in any event — the trial court went on to grant summary judgement and dismiss the *Complaint* for a third distinct reason: the matters set forth for adjudication have already been tried and decided. As the trial court wrote:

> Under the principles of res judicata and collateral estoppel parties are precluded from "relitigating issues that were or could have been dealt with in an earlier litigation." *Betances v. Quiros*, 603 F. Supp. 201, 205 (D. Puerto Rico 1985), quoting *Angel v. Bullington*, 330 U.S. 183 (1947). The Full

> Faith and Credit principle provides that State court decisions have the same preclusive effect in Federal courts as in State courts. *Bennun v. Board of Governors of Rutgers,* 413 F. Supp. 1274, 1278 (D. N.J. 1976). The Virginia courts have ruled on these issues and ". . . [s]ection 1983 does not authorize a litigant to relitigate in a federal forum an issue already determined by a state court." *Concordia v. Bendekovic,* 693 F.2d 1073, 1077 (11th Cir. 1982) Additionally, if the claim is one that should have been resolved in a previous lawsuit, it will be precluded. *Keith v. Aldridge,* 900 F.2d 736, 740 (4th Cir. 1990).

App. pp. 12-13.

In light of this precedent, the trial court held each of the Petitioner's substantive claims barred by the doctrines of *res judicata* and/or collateral estoppel. First the court held:

> Plaintiff's claim of lack of jurisdiction of the court over his stock has been litigated in the Fairfax Circuit Court, denied appeal by the Virginia Supreme Court, and denied Writ of Certiorari by the United States Supreme Court. This question has been fully litigated and cannot be reopened now.

App. p. 13.

This holding was amply supported by the record, which established that in November, 1991 the Petitioner moved to vacate the *Stock Turnover Order,* arguing to the Virginia state court that it had no jurisdiction over his stock. In his 1991 motion the Petitioner argued:

> The Order of Attachment entered by the Circuit Court against Izadpanah's Aidant Stock, on August 29, 1991, is Void for Want of Jurisdiction Over the Res Attached.

This precise issue was presented to this Court in the Petitioner's unsuccessful 1993 Petition for a Writ of Certiorari. This Court implicitly rejected the claim when denying the 1993 Writ. The matter has been fully litigated, and the trial court properly granted summary judgment.

Next the trial court held that:

> Plaintiff has already litigated the issue of improper service. His motion to vacate was denied as was his appeal to the Virginia Supreme Court. The same arguments were made and rejected when the U.S. Supreme Court denied his Writ of Certiorari.

App. p. 13.

In his 1991 motion, Petitioner made this notice argument:

> No service upon Izadpanah was ever effected notifying him that a hearing would be held relating to the attachment of his Aidant stock.

Again, the state courts rejected the argument, as did this Court. Nevertheless, this decided matter reappeared in the present *Complaint,* and the trial court properly granted summary judgment.

Next the court held that the Petitioner's fraud claims had been previously litigated and were therefore barred, saying:

> . . . plaintiff argued that the defendants had committed various frauds in connection with the Virginia judicial system, i.e., that his attorneys were fraudulently induced into signing the Consent Judgement, that the court was fraudulently employed to strip the plaintiff of his stock, that Mr. Gross misrepresented his client's identity and the fact that the debt was due and owing.

App. p. 13.

As noted in the Statement of the Case, the Petitioner had his day in court on these issues. But the state court disagreed, and the Petitioner's appeals on these issues through and including this Court were rejected, yet the present Complaint resurrects these precise arguments. The trial court was entirely correct in ruling that these claims have been "fully and finally decided." *Id.*

Finally, the trial court reviewed the Petitioner's prior state court pleadings (which were offered as evidence in support of summary dismissal), then held that:

> The same claim in plaintiff's present Complaint, that defendants violated state and federal securities laws, has been rejected by the Fairfax Circuit Court, and appeals denied by the Virginia Supreme Court and the U.S. Supreme Court. Thus, the question of any violation of federal or state securities laws has already been decided.

(App. pp. 13-14). This holding, having been based upon review of the Petitioner's own pleadings, is undisputable. Indeed, even a cursory review of the Petitioner's prior Petition for a Writ from

this Court reveals that these issues were fully litigated. As the trial court ruled, this argument was pursued and denied through this Court; therefore, "the question of any violation of Federal and State securities laws has already been decided," and furthermore:

> Plaintiff is precluded from bringing any action based on violation of federal or state securities laws whether he was aware of them at the time of the original filing or not. It is the existence of the claim not the awareness of it that controls. *Keith*, 900 F.2d 740. The plaintiff raised this very claim at trial and lost. The decision was unsuccessfully appealed to the Virginia and United States Supreme Courts.

App. p. 14.

The Petitioner challenges the trial court's reliance on *Keith*, suggesting that this precedent does not apply because the facts giving rise to his claim were intentionally withheld from him. But the trial court made a specific factual finding that the Petitioner knew of these facts by November 1991, and this finding is supported by the Petitioner's own 1991 pleading admissions as fully discussed *supra*. Therefore, there can be no legitimate dispute on this point. The simple fact is that the Petitioner has filed a case in federal court seeking to relitigate adverse state court decisions. The trial court, when given evidence of the prior proceedings, granted summary dismissal for several separate and distinct reasons. This summary dismissal was upheld on appeal (the case being partially remanded *solely* to determine whether sanctions should be imposed on Petitioner's counsel for filing this case in the first place).

CONCLUSION

The Petitioner has previously fully litigated every issue raised in his petition. He is precluded from relitigating those same issues in this Court or any other. Even if the Petitioner's semantic tinkering can be viewed as creating "new" claims, these claims are nevertheless barred both because they require reversal of state court decisions previously upheld through and including appeal to this Court, and because they arise out of exactly the same transactions or occurrences and therefore could have been previously raised. It is time to lay this matter to rest once and for all. Therefore, Respondents respectfully request that the Petition for a Writ of Certiorari be denied, and that the Respondents be awarded their costs.

Respectfully submitted,

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APPENDIX A — ORDER AND MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA DATED JUNE 19, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

CIVIL ACTION NO. 94-1150-A

ALLEN A. IZADPANAH,

Plaintiff,

EDWARD GROSS, *et al.*,

Defendants.

ORDER

In accordance with the accompanying Memorandum Opinion, the defendants are entitled to recover fees in the amount of $61,828.25, and expenses of $5040.52, from William S. Burroughs, Jr., Walter T. Charlton, and Joel A. Deboe.

s/ Claude M. Hilton
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
June 19, 1996

Appendix A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

CIVIL ACTION NO. 94-1150-A

ALLEN A. IZADPANAH,

Plaintiff,

EDWARD GROSS, *et al.*,

Defendants.

MEMORANDUM OPINION

This case is before the Court on remand from the United States Court of Appeals for the Fourth Circuit for reconsideration of sanctions.

The plaintiff brought this suit against the defendants seeking to overturn a court ordered sale of his stock in Aidant and to recover damages for an alleged fraud on a state court, violations of civil rights under 42 U.S.C § 1983, violations of § 10(b) of the Securities Exchange Act of 1934, and violations of the Virginia securities laws.

In May 1991, as a result of negotiations to settle an outstanding judgment against him as a guarantor of debt owed by Aidant, Izadpanah entered into a consent judgment in favor of Sirex USA, Incorporated (Sirex). Crowe and Hummel were shareholders in Aidant and on its board of directors. Izadpanah

was an officer and director of Aidant. After several unsuccessful collection attempts, Sirex executed documents transferring its rights in the judgment to FCC in July 1991. FCC filed a Motion to Turnover Property with the Fairfax County Circuit Court in August 1991, and the court ordered the sale of Izadpanah's stock in Aidant with the proceeds to be applied to the consent judgment. Izadpanah subsequently filed a motion to vacate the sale, arguing that the state court did not have jurisdiction over the stock. The state court rejected Izadpanah's argument, and the Supreme Court of Virginia affirmed.

Izadpanah then filed this action asserting a conspiracy between Crowe, Hummel, and Gross, acting both individually and through Aidant and FCC, to deprive him of his stock in Aidant and to gain complete control of that company. He alleged that, as part of this conspiracy, defendants committed a fraud on the state court by inducing him to enter into the consent judgment without disclosing that FCC had actually purchased the rights to the judgment from Sirex prior to May 1991. He also argued that defendants conspired to deprive him of his stock without due process of law and that the court-ordered sale of his stock in Aidant violated federal and state securities laws. This court granted summary judgment against Izadpanah on the grounds that it did not have jurisdiction to review decisions by state courts; that Izadpanah's civil rights and securities claims were barred by the applicable statutes of limitation; and further, that all of the claims were precluded by Virginia principles of res judicata and collateral estoppel applied under the full faith and credit statute, 28 U.S.C.A. § 1738 (West 1994). This court denied the defendant's motion for sanctions against Izadpanah considering his argument that the alleged securities fraud gave jurisdiction in this case and distinguished his facts from a review of the decision of the Circuit Court of Fairfax County, Virginia.

Appendix A

In his initial brief on appeal, the plaintiff argued that this court had jurisdiction. However, he withdrew this claim in his reply brief conceding that his claim was a review of a state court decision, and that he had failed to properly consider *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), which precludes such review.

Rule 11 of the Federal Rules of Civil Procedure requires an attorney to conduct a reasonable investigation of the factual and legal basis of his claim before filing. *Brubaker v. City of Richmond*, 943 F.2d 1363, (4th cir. 1991).

By filing this complaint, counsel represented to the court that the claims were warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law.

Counsel were on notice of the question of jurisdiction from the beginning of this action and continued to pursue their claims through motions to dismiss and motions for summary judgment in this court. They appealed the grant of summary judgment in this court and continued to pursue their position until the filing of a reply brief in the court of appeals where they concede the jurisdiction issue. Obviously, this case was not pursued for a non-frivolous argument for the extension, modification, or reversal of existing law. Had such an intent existed, counsel would have continued with their arguments before the court of appeals. Had this court had any evidence that counsel for the plaintiff was continuing this action only to concede they were not serious in making their legal challenge on their attempt to distinguish *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), sanctions would have been granted in the court's order of December 2, 1994.

Appendix A

The defendants have submitted statements for counsel fees of $61,828.25, and expenses of $5040.52 for representation in the district court and the court of appeals. The rates charged and the hours spent are reasonable for work done. Three lawyers are counsel of record in this case, and have appeared and argued and submitted briefs in both this court and the court of appeals. They are William S. Burroughs, Jr., Walter T. Charlton, and Joel A. DeBoe. Attorneys Charlton and DeBoe were in this case from the beginning. Attorney Burroughs was in the case from summary judgment through appeal. The defendants are entitled to sanctions against all counsel.

The rule in this circuit is that the least sanction to serve the purpose of Rule 11 should be imposed. In re: *Kunstler*, 914 F.2d 505 (4th cir. 1990) *cert denied* 111 S.Ct. 1607 (1991). The plaintiff and counsel were required to make a reasonable investigation of the legal basis for their claim. This should have been done prior to filing a complaint, or at least at the summary judgment argument, instead of in a reply brief before the court of appeals. The only proper sanction is the entire amount of defendants' fees and costs.

An appropriate Order shall issue.

s/ Claude M. Hilton
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
June 19, 1996

(3)

Supreme Court, U.S.
FILED
SEP 30 1996
CLERK

No. 95-1938

IN THE SUPREME COURT OF THE UNITED STATES

October, 1995, Term

ALLEN A. IZADPANAH, et al
Petitioners

v.

EDWARD GROSS, et al,
Respondents

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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REPLY ARGUMENT

I. The courts below misconstrued the Feldman decision. Defendants' state that there are three questions presented by Izadpanah's petition. The first of these is said to be whether the district court had jurisdiction to overturn a state court decision. However, this issue was withdrawn in the court of appeals.

It is Izadpanah's position that the only portion of the case which was affected by such withdrawal was his request that the district court, sitting as a federal court and exercising its original jurisdiction, review a ruling of the Virginia state court which allegedly denied federal due process, i.e., a ruling that the latter court had jurisdiction over Izadapanah's stock, for purposes of an attachment, notwithstanding that such stock was located in Maryland. Izadpanah was not requesting any other "review" of the Virginia court's rulings.

The appeal of the district court's denial of the said limited request for review was withdrawn upon a reconsideration by Izadpanah's counsel of the effect of District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983). Prior to the withdrawal, Izadpanah had contended that Feldman could be distinguished, relying on other authority.

The Feldman case holds that a review of an alleged violation of federal law by a state court is to be sought within the state court system through its court of last resort, and if such an appeal is unsuccessful, the matter is to be brought before this Court, rather than a lower federal court.

Notwithstanding its applicability only to the said limited requested for review, the Feldman ruling has been construed in this case to apply to Izadpanah's additional request that the district court, sitting as a state court and exercising its supplemental and/or diversity of citizenship jurisdiction, set aside the entry of a judgment by the state

court. The grounds for the latter request were an alleged fraud on the state court and on Izadpanah, in violation of state law.

The Court will please note that the latter request is completely unaffected by the ruling of Feldman, inasmuch as there is no allegation that the state court did anything wrong, much less that the state court violated federal law.

The misapplication of Feldman by the district court and the court of appeals to Izadpanah's claim of fraud on the state court under state law has led Defendants to contend that Izadpanah still presents the issue of a "review" of the rulings of the state court, generally. In this regard, Izadpanah contends that it is only the scope of the Feldman decision which is still at issue.

II. Izadpanah is not attempting to retry his state case. Defendants say that the second question presented is whether Izadpanah is attempting to "retry his (state court) case in federal district court." In this regard, the Court will note that neither of the two state court cases in question, the Boeing litigation and the Sirex collection case, involved any of the issues raised in the instant case, other than with respect to two aspects of the Sirex case. The Boeing litigation contained no issues of fact or law which logically can be construed as similar to the issues of the instant case.

The said two aspects of the Sirex case are (1) the method by which Defendants settled the Sirex case, i.e., the allegation that such settlement, which included a consent judgment, was obtained by fraud, and (2) the manner in which Defendants sought to enforce such consent order, i.e., the alleged denial of due process described above as the issue which was withdrawn in the court of appeals.

Thus, in light of the said withdrawal as to the enforcement of the Sirex judgment and the lack of connection to the Boeing litigation, it appears that Defendants'

version of the second issue is that, by alleging fraud on the state court and himself, Izadpanah is attempting to retry that portion of the Sirex case in which he attempted to raise the fraud issue.

However, this argument is presented by Defendants as though Izadpanah were attempting to have the consent judgment in the Sirex case "ignored (or) set aside" by the federal court in the same sense that one would ask to have a state court judgment set aside because of some incorrect ruling by the state court.

Thus, Defendants' description of the so-called second question is misleading, in that the issue to which they actually are referring is whether the district court was correct in applying the doctrine of res judicata to dismiss Izadpanah's state law fraud claims, not whether Izadpanah asked the district court to set aside a state court decision because of an alleged error by the state court.

As to Defendants' version of the third question presented by the petition, whether the district court properly applied "the doctrines of claim and issue preclusion," the Court will note that such version is simply another manner of expressing the actual issue in the so-called second question, i.e., the actual issue of whether the district court properly applied the doctrine of res judicata.

III. Defendants' argument on the facts is misleading in several respects. On Page 1 of their brief Defendants make much of the state court finding, adopted by the district court, that Izadpanah had not paid the debt to Sirex upon which the consent judgment was based.

However, at no point do the Defendants address the relevant issue with respect to payment of the Sirex debt, i.e., whether Sirex was paid secretly by the Defendants, prior to the inducement of the settlement of the Sirex case and the entry of the consent judgment. Therefore, it is misleading for Defendants to argue that there is any relevance in Izadpanah's failure to pay the Sirex debt.

On Page 1 of their brief, Defendants state that Izadpanah "previously, unsuccessfully argued the precise issues resurrected in his current case," in the state trial court, unsuccessfully appealed such issues to the Virginia Supreme Court and was denied a writ of certiorari in this Court, as to such issues. This argument is also made at Page 7 of Defendants' brief.

However, Defendants fail to note that it was the refusal of the state court to decide Izadpanah's state law fraud claims which was appealed, not an adverse ruling on the substance of such claims. As was said at Page 14 of the petition for writ of certiorari in Benzinger V. Sirex, U.S.A., Inc., No. 93-1870 in the October, 1993, term of this Court:

> Although repeatedly brought to its attention, the trial court never considered the misrepresentation and deceit by the (Defendants) ... and ignored the clear evidence that the debt was actually paid ....

Therefore, it is misleading for Defendants to argue that the fraud claims were decided by the state court and that Izadpanah's prior petition presented the same issues as are presented herein.

As to Izadpanah's federal law claims of securities fraud and violation of civil rights, it is obvious that they were not before the state court.

On Page 2 of their brief, Defendants complain about Izadpanah's failure to cite any evidence in the record relating to the alleged fraud. This argument supports Izadpanah's position that the district court should have allowed the case to go to trial, i.e., that the district court should have taken evidence before deciding the case.

As to evidence in opposition to Defendants' motion for summary judgment, Izadpanah submitted affidavits and exhibits in support of the allegations of the complaint.

IV. The effort to cast Izadpanah's case in a bad light, by reference to the sanctions order, is misleading. On Page 2 of their brief, Defendants refer to the sanctions imposed by the district court on remand by the court of appeals, in support of their contention that Izadpanah's case is based upon speculation and assumption.

However, Defendants fail to mention that Izadpanah's counsel have been sanctioned because the district court concluded, solely because of the withdrawal of the issue on appeal described above, that such counsel had advanced the argument in question for other than a non-frivolous purpose. Counsel have not been sanctioned because of a finding that such argument itself was frivolous. Nor have counsel been sanctioned because of any finding that the other arguments advanced in this case are frivolous.

In fact, the district court has twice found that the arguments advanced by Izadpanah were not frivolous, the first such finding being expressly made in its denial of Defendants' initial motion for sanctions and the second such finding being made by necessary implication in sanctions order.

Also, the district court did not find that Izadpanah's pre-filing investigation of the facts was inadequate. The only reference in the sanctions order to the pre-filing activity of Izadpanah's counsel is the admonition that counsel should have reached their conclusion, as to the lack of value of the precedent upon which they were relying, prior to the late stage of the appeal at which counsel changed their minds and withdrew the issue. The Court will note that the latter admonition is made notwithstanding the finding that the issue itself was not frivolous, as opposed to its prosecution.

The Court will please note that the order for sanctions has been appealed on several grounds, the main issue being whether an attorney who changes his mind, in good faith, about the wisdom of proceeding with a non-

frivolous issue, and withdraws the issue in accordance with rules of ethics and FRCP 11, may be sanctioned solely because of such withdrawal. In this regard, the Court will please note that the withdrawal was taken, in and of itself, as sufficient evidence of a lack of serious purpose in prosecuting the issue in the first instance.

In light of the foregoing, it is misleading for the Defendants to argue that, because sanctions have been imposed, the district court concluded that Izadpanah's case was based on speculation and assumption.

V. There is a basis under Rule 10 for granting the writ. On Page 3 of their brief, Defendants argue that the provision of Rule 10, that a writ of certiorari is rarely granted where the asserted error is the misapplication of a properly stated rule of law, is applicable herein. However, Izadpanah contends that the district court and the court of appeals have misstated the rule of Feldman, supra, in that the latter decision of this Court, contrary to the rulings of the lower courts herein, does not apply to the setting aside of a state court judgment by a district court sitting as a state court and applying state law under its supplemental or diversity of citizenship jurisdiction, especially where the state court judgment is to be set aside for fraud on the state court, i.e., especially where the state court is the alleged victim of wrongdoing, rather than a source of error.

VI. The alleged fraud on the state court did not arise from a mere evidentiary dispute. On Page 7 of their brief, Defendants cite Cleveland Demolition v. Azcon Scrap, 827 F.2d 984 (4th Cir. 1987) for the proposition that a routine evidentiary dispute cannot be the basis for a separate fraud action. However, such proposition is not applicable herein, inasmuch as the fraud in this case is alleged to have occurred before the entry of the Sirex consent order, unrelated to any

evidence in the Sirex case. Also, with respect to any evidentiary dispute that may have developed had the state court entertained the fraud claims in the course of the enforcement of the consent order, there obviously was none, because the state court refused to consider the fraud claims.

VII. The injunction tolled the period of limitation on Izadpanah's securities law claim. On Page 8 of their brief, Defendants argue that, on its face, the state court injunction did not apply to the instant case. Izadpanah contends that, under the circumstances surrounding the injunction, it was reasonable for him to interpret it such that the filing of this case would have been in violation thereof. In particular, with respect to the admonition not to file on behalf of Aidant, Inc., Izadpanah's purpose in the instant case is to regain ownership of his Aidant stock, so that he can prosecute a derivative action on behalf of Aidant.

The district failed to address the injunction issue in any manner, notwithstanding the factual dispute as to the meaning of the injunction.

In any event, even if Defendants are correct in their interpretation of the injunction, the point affects only Izadpanah's securities law claim under S.E.C. Rule 10b-5. This is because only the latter portion of the case is subject to a one-year period of limitation, pursuant to Lampt, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350 (1991), and it is only such a one-year period that is affected by the injunction.

VIII. Defendants' argument as to the three-year period of limitation on Izadpanah's securities law claim is not only incorrect, but also misleading. On Page 9 of their brief, Defendants argue that the measuring point for the beginning of the three-year period of limitation on Izadpanah's Rule 10-b5 claim, set by this Court in the Lampt

decision, is the time of the fraud. Defendants cite Howard v. Haddad, 962 F.2d 328 (4th Cir. 1992) for the proposition that it is the securities law "violation" which marks the beginning of the three-year period.

However, it is the securities transaction by which Izadpanah was defrauded that marks the beginning of the period. This is because Rule 10b-5 requires that a transaction occur before there is a violation of the rule. Notwithstanding that Izadpanah makes this point in his petition, Defendants fail to address it.

On Page 10 of their brief, Defendants attack the validity of Izadpanah's allegation that he was deprived of his stock on August 29, 1991, the date of entry of the stock turnover order, and his argument that, therefore, the latter date is the correct measuring point for the beginning of the said three-year period of limitation, inasmuch as it evidences the "transaction" in this case. Defendants attack Izadpanah's said argument notwithstanding that the district court is quoted on Page 11 of Defendants' brief to the effect that Izadpanah "lost ownership of the stock pursuant to the Stock Turnover Order entered by the Fairfax Court."

As to Izadpanah's allegation that the pattern of fraudulent conduct resulting in the loss of his stock on August 29, 1991, Defendants argue that they took no action on August 29, 1991, yet that is the date they obtained the stock takeover order, allegedly in furtherance of their fraudulent scheme.

Also, for the Defendants to suggest that the state court's action on the latter date is somehow a subject of Izadpanah's fraud claim is misleading, in that it is fraud on the state court about which Izadpanah is complaining, not any action of the state court (now that the due process issue has been withdrawn). It would appear that Defendants are attempting to blur the line between Izadpanah's claim that the Virginia court denied him due process in attaching the stock

in Maryland (which claim has now been withdrawn), and Izadpanah's claim that he has been damaged because of the alleged fraud on the state court.

On Page 10 of their brief, Defendants argue that the district court "made a specific factual determination that the Plaintiff (Izadpanah) knew the facts giving rise to his fraud claims in 1991." It is Izadpanah's position that Defendants are making this argument based on an obvious misconstruction of the facts by the district court; and that their argument is misleading.

It is obvious from the record that the fraud was not discovered until 1992, and that, in referring to the facts known to Izadpanah in 1991, the district court must have either been confused as to the date of the discovery of the fraud, or been referring to the other facts involved in the fraud, i.e., the entry of the consent judgment, etc., which were not known by Izadpanah to have been carried out with fraudulent intent, until the 1992 discovery of the fraud.

Moreover, Defendants attempt to bolster this confused view of the facts by quoting a 1991 state court pleading (not identified in the record) which contains a reference by Izadpanah to "the complexity of the fraud," arguing that this reference to a fraud means that Izadpanah knew in 1991 of the fraudulent manner by which the Sirex judgment had been obtained. The Court will please note that the fraud to which Izadpanah was referring in 1991 was the fraud said to have resulted from the wrongful manner in which the sale of the stock was conducted in 1991, before the pertinent fraud was discovered in 1992; and that the reference in the 1991 pleading was not to the fraudulent scheme to obtain the judgment.

Izadpanah contends that it is an understatement to characterize Defendants' latter argument, concerning the state of Izadpanah's 1991 knowledge of the pertinent fraud, as misleading.

IX. Defendants do not address Izadpanah's argument as to the forced seller doctrine. On Page 11 of their brief, Defendants argue that the forced seller doctrine applies to corporate merger situations, without addressing the point made by Izadpanah in his petition, i.e., that there is no restriction of the application of the doctrine to corporate mergers.

X. Defendants' argument as to the period of limitation for Izadpanah's civil rights claim is misleading. On Page 12 of their brief, Defendants repeat the misleading argument described above, with respect to a so-called finding by the district court that Izadpanah knew about the fraud to deprive him of his stock in 1991, well before the fraudulent scheme was discovered in 1992.

Defendants make no effort to distinguish Cox v. Stanton, 529 F.2d 47 (4th Cir. 1975), the authority relied upon by Izadpanah and which is directly on point, as to his position that the period of limitation for his civil rights claim began to run upon his discovery of the fraud, not at the time of the fraud.

XI. Defendants' argument as to the basis for Izadpanah's civil rights claim is not responsive. Izadpanah contends that the district court erred in ruling that he had not stated a claim under 42 U.S.C. Section 1983 (as set forth in the amended complaint), because the basis for such ruling was a finding that the Sirex judgment was valid. The district court ruled that the enforcement of a valid judgment cannot be the basis for a Section 1983 action, a point with which Izadpanah does not take issue. However, Izadpanah does take issue with the district court's said finding that the Sirex judgment was valid, without there having been a trial of the allegedly fraudulent inducement of the consent judgment, and on that ground, Izadpanah contends that the district court erred.

At Page 13 of their brief, Defendants argue that Izadpanah has not stated a claim for violation of Section 1983, without addressing the foregoing point made by Izadpanah, i.e., without explaining how the district court could find that there was no fraud without a trial of the issue.

Rather, Defendants argue that Section 1983 was not intended to provide relief where the agent of the government, in this case the state court judge, acted innocently. However, in Lugar v. Edmondson Oil Co., 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982), it was held that the defendant's procurement of a wrongful attachment of the plaintiff's property constituted a civil rights violation under 42 U.S.C. Section 1983. The defendant in that case acted jointly with a sheriff, who was not at fault, to deprive the plaintiff of his property, and such deprivation was held to have been under color of state law. Herein, it is alleged that Defendants acted jointly with a state court judge, who was not at fault, to deprive Plaintiff of his stock.

Thus, Plaintiff contends that the Lugar decision directly supports his civil rights claim herein, and it is cited in response to Defendants' argument Section 1983 is not applicable, notwithstanding Izadpanah's position that the actual issue is whether the district court erred in finding the Sirex judgment to have been valid and using such finding to rule on the civil rights claim.

XII. Defendants' argument as to Izadpanah's state law fraud claims is misleading. At Page 14 of their brief, Defendants contend that, the state law fraud claims having depended on "the erroneous factual premise that the debt was paid, they were properly dismissed." Defendants repeat the misleading argument concerning payment of the Sirex debt, i.e., that the state court found that Izadpanah had not paid the debt, without reference to the fact that the relevant point is the allegedly secret payment

of the debt by the Defendants. The misleading character of this argument is explained in Section III of this reply brief.

XIII. With respect to the applicability of res judicata, Defendants' repeat their misleading argument concerning Izadpanah's knowledge of the fraud in 1991. There are three important aspects of Defendants' response to Izadpanah' argument that res judicata does not apply herein to preclude consideration of his state law fraud claims.

The first important aspect of Defendants' response is their failure to address Izadpanah's contention that the state court declared on the record that it was not deciding the fraud issue, and that the state court actually rejected Izadpanah's proffer of his evidence of fraud.

The second important aspect of Defendants' response is their repetition of the misleading argument that the fraud issue was decided by the state court, which led to an appeal to the Supreme Court of Virginia and the Benzinger petition to this Court, where in actuality the issue on appeal was the refusal of the state court to consider the fraud issue, as explained in Section III above.

The third important response to Izadpanah's argument against the application of res judicata is Defendants' repetition of their misleading argument that the district court found that Izadpanah had knowledge of the fraud in 1991, well before its discovery in 1992. The misleading character of this argument is described in Section VIII above.

At Page 18 of their brief, the latter argument is submitted by Defendants in support of their position that Keith v. Aldridge, 900 F.2d 736 (4th Cir. 1990) controls, rather than Hartnett v. Billman, 800 F.2d 1308 (4th Cir. 1986), the case authority relied upon by Izadpanah (although Defendants do not refer to Hartnett by name).

The Court will recall from Izadpanah's petition that Keith holds that, where an

unresolved issue is one that should have been resolved in a previous lawsuit, it will be precluded from a subsequent lawsuit. Keith also held that it is the existence of such an issue that controls, rather than a plaintiff's awareness thereof.

On the other hand, as is also discussed in Izadpanah's petition, Hartnett holds that an issue will not be precluded, whether it is an issue that was resolved or one that ought to have been resolved, where the plaintiff's lack of awareness of his cause of action is the result of intentional concealment by the defendant. Of course, the allegation herein is that the fraudulent nature of the Sirex judgment was concealed by the Defendants until Izadpanah's discovery of the scheme in 1992.

To counter the effect of Hartnett, Defendants repeat their misleading argument that Izadpanah knew of the fraud in 1991.

In addition to the foregoing three important aspects of the res judicata argument, Defendants, at Pages 15-16 of their brief, argue that the issue involving the Virginia court's attachment of the stock located in Maryland has been previously decided. The Court will note that this issue has been withdrawn from the case.

At Page 16 of their brief, Defendants also argue concerning issues of improper service and improper notice, as to the sale of the Aidant stock after its attachment. The Court will note that these issues are not a part of the instant petition.

At Page 17 of their brief, Defendants argue that the district court correctly ruled that Izadpanah's claim under Rule 10b-5 had been decided by the state court, notwithstanding that jurisdiction over such claim is exclusively in the federal courts, pursuant to 15 U.S.C. Section 78aa.

CONCLUSION

Izadpanah asks that his petition for a writ of certiorari be granted, Defendants

having presented arguments which are for the most part misleading or not responsive to the points raised in Izadpanah's petition; and that he be awarded his costs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing reply brief were mailed to Edward Gross, Esq., 3975 University Drive, Suite 410, Fairfax, 22030, Counsel for Respondents, on the 27th day of September, 1996.

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